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In The

Supreme Court of the United States

October Term, 1995

ONE WORLD ONE FAMILY NOW, A Hawaii non-profit corporation; JAMES McDONOUGH, an individual; BHAKTIVEDANTA MISSION, LTD., a Hawaii non-profit corporation; and ANTON VOIGHT, an individual,

Petitioners,

v.

CITY AND COUNTY OF HONOLULU; FRANK F. FASI, individually and in his capacity as Mayor of the City and County of Honolulu; MICHAEL NAKAMURA, Chief of Police; DONNA WOO, individually and in her capacity as Special Deputy Attorney General of the State of Hawaii; and JOHN DOES 1-10,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, under the First Amendment, sales that are inextricably intertwined with the dissemination of expressive materials may be prohibited, even though the materials themselves are not prohibited and may be disseminated free of charge.

2. Whether a complete ban on a medium of protected expression – the sale of message-bearing T-shirts by nonprofit and noncommercial organizations – in the entire Waikiki district, which is the social, political and economic center of Honolulu, violates the First Amendment.

3. Whether, in the context of time, place and manner analysis, a significant governmental interest may be presumed by the court of appeals to exist in areas other than those encompassed by the holdings of the district court.

4. Whether a complete ban in a traditional public forum of a unique and important mode of protected expression for which there are no realistic, practical and adequate alternatives violates the First Amendment.

PARTIES TO THE PROCEEDING

The caption of the case contains the names of all the parties to the proceeding. There is no parent or subsidiary company to be listed pursuant to S. Ct. R. 29.6.

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PETITION FOR A WRIT OF CERTIORARI

One World One Family Now, a Hawaii nonprofit, religious corporation, James McDonough, an individual, Bhaktivedanta Mission, Ltd., a Hawaii nonprofit, religious corporation, and Anton Voight, an individual, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals, App. 1, is reported at 76 F.3d 1009. The opinion and order of the district court, App. 25, is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 13, 1996, and a petition for rehearing was denied and suggestion for rehearing en banc declined on June 4, 1996. App. 63. An application for an extension of time within which to file the petition for certiorari was presented to Justice O'Connor, who, on August 23, 1996, extended the time to and including October 2, 1996. Jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND ORDINANCE INVOLVED

1. The First Amendment to the United States Constitution provides, in part: "Congress shall make no law . . . abridging the freedom of speech, or of the press."

2. The Fourteenth Amendment to the United States Constitution, section 1, provides, in part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; . . . . "

3. Section 29-6.2(b)(7), Revised Ordinances of Honolulu, provides, in relevant part, as follows:

> (b) Notwithstanding any ordinance to the contrary, it is unlawful for any person to sell or offer for sale, rent or offer for rent, goods, wares, merchandise, foodstuffs, refreshments or other kinds of property or services in the following area:
>
> . . .
>
> (7) Waikiki Peninsula upon the public streets, alleys, sidewalks, malls, parks, beaches, and other public places in Waikiki commencing at the entrance to the Ala Wai Canal, thence along the Ala Wai Canal to Kapahulu Avenue to the Ocean, thence along the ocean back to the entrance of the Ala Wai Canal;
>
> The provisions of this subsection shall not apply to the sale or offer for sale of newspapers of general circulation and to duly authorized concessions in public places . . .

(c) The provisions of subsection (b) of this section shall not be construed as prohibiting the sale or offer for sale on the public sidewalks of an approved parade route of buttons and souvenir items . . . for which a permit has been issued pursuant to Section 15-24.20. . . .

STATEMENT

1. Petitioners are two nonprofit religious organizations, and their individual members, who seek to educate the general public about the spiritual aspects of problems affecting the environment (spiritual ecology) on the public sidewalks of Waikiki. Petitioners' activities include distributing literature to interested persons and discussing such issues as global warming, toxic waste, vegetarianism and animal protection, and the relationship between religion and the environment. T-shirts with a message directly related to petitioners' missions and activities are also displayed and offered for sale in order to spread their messages and raise funds for their causes.

The petitioners seek to conduct their activities in the Waikiki district of Honolulu because of the large number and diversity of people that can be found there. Waikiki is the center of Hawaii's tourist industry and economy, and has the highest density of residential development in the State. It has also served as the center of Hawaiian culture and social gatherings for hundreds of years. It is, in all respects, the only place in Honolulu where petitioners may find the audience which they seek to reach.

In May, 1994, the City sought to enforce its commercial peddling ordinance against plaintiffs' expressive

activities. At that time, petitioner One World One Family Now had been conducting its activities in Waikiki since August, 1992. Petitioner Bhaktivedanta Mission had been conducting its activities in Waikiki since May, 1993. Petitioners' activities were conducted primarily on Kalakaua Avenue, which is 1.5 miles in length and is Waikiki's main thoroughfare. The sidewalks of Kalakaua Avenue are also the most expansive in Waikiki. Although the petitioners did not conduct their activities on Kuhio Avenue, which extends 1.2 miles in length and is Waikiki's second most prominent thoroughfare, the district court ruling encompassed this street as well.

The City's peddling ordinance bans the sale of all "goods, wares, merchandise, foodstuffs, refreshments or other kinds of property or services . . . upon the public streets, alleys, sidewalks, malls, parks, beaches and other public places in Waikiki," *see* Honolulu, Haw. Rev. Ordinances § 29-6.2(b)(7), and has been construed and applied by the respondents to ban the sale of message-bearing T-shirts by nonprofit organizations in the entire Waikiki district of Honolulu.

2. On May 27, 1994, plaintiffs filed this action for declaratory and injunctive relief when the City threatened to enforce the peddling ordinance against their activities on Kalakaua and Kuhio Avenues. On June 1, 1994, the district court issued a Temporary Restraining Order preventing the City from enforcing the peddling ordinance against plaintiffs' activities.

Following an evidentiary hearing on plaintiffs' motion for preliminary injunction, the district court modified its initial decision in a ruling issued on July 7, 1994.

Citing the City's purported interests in aesthetics, pedestrian congestion, and protecting private merchants from unfair competition from nonprofit organizations, the court refused to enjoin enforcement of the ordinance against plaintiffs' admittedly protected activities on Kalakaua and Kuhio Avenues. Finding that the City had failed to substantiate its interests in the remainder of Waikiki, however, the court granted plaintiffs' motion as to those areas. Both petitioners and respondents appealed.

3. A divided panel of the court of appeals affirmed in part and reversed in part. The majority agreed that petitioners' activities were protected by the First Amendment. App. at 6, 76 F.3d at 1012. However, the panel found the restriction on Kalakaua and Kuhio Avenues to be a valid time, place and manner regulation of petitioners' expressive activities, and affirmed that portion of the injunction. Holding that the same interests that existed on Kalakaua and Kuhio Avenues could be "presumed to operate throughout a city, absent a strong showing to the contrary" App. 15, 76 F.3d at 1015, the majority reversed the injunction issued by the district court as to those areas.

Judge Pregerson dissented because he believed the majority decision unnecessarily eviscerated the court's previous ruling in *Gaudiya Vaishnava Soc'y v. City & County of San Francisco*, 952 F.2d 1059 (9th Cir. 1990), *cert. denied*, 504 U.S. 914 (1992), which, in a case of first impression, recognized the right of nonprofit organizations to sell message-bearing T-shirts in appropriate public fora. App. 16-19, 76 F.3d at 1020-21. According to Judge Pregerson, the Honolulu "ban amounts to an

unlimited governmental restriction of speech in a public forum – in substance, the same kind of governmental action condemned in *Gaudiya*." App. 18, 76 F.3d at 1020. The dissent also found the majority's time, place, and manner analysis to be "thin." App. 20, 76 F.3d at 1021. In Judge Pregerson's view, the majority's narrow tailoring analysis was undermined by the presence of "numerous and obvious, less-burdensome alternatives" to the complete ban on petitioners' sales activities. App. 20, 76 F.3d 1021 (*citing City of Cincinnati v. Discovery Network Inc.*, 113 S. Ct. 1505, 1510 n.13 (1993)). Judge Pregerson would also have found the sale of message-bearing T-shirts in the Waikiki district to be a unique and vital mode of communication for which there are no viable alternatives. App. 22-24, 76 F.3d at 1022-23.

REASONS FOR GRANTING THE PETITION

The Honolulu peddling ordinance has been construed and applied to ban a unique, vital and widely accepted mode of communication – the sale of message-bearing T-shirts – in the entire Waikiki district of Honolulu. Prior decisions of this Court, however, make clear that the ordinance burdens substantially more speech than is necessary to achieve the City's interests, and fails to provide realistic and adequate alternative channels of communication.

Both the respondents and the majority panel below seek to minimize the significant impact that the peddling ordinance has had on petitioners' sales activities by referring to other forms of speech that are still available, such

as the distribution of literature, giving out free T-shirts, or even selling T-shirts "through local retail outlets or by opening their own stores." App. 12, 76 F.3d at 1014. Lost in this analysis, however, is the recognition that the dissemination of ideas and collection of funds are, in many respects, inextricably intertwined. And, while the government may regulate sales, it may not "unreasonably obstruct or delay the collection of funds," *Cantwell v. Connecticut*, 310 U.S. 296, 305 (1940), as is being done here.

A ban such as that imposed by the Honolulu peddling ordinance is thus an extreme form of obstruction that "suppress[es] a great quantity of speech that does not cause the evils that it seeks to eliminate." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 n.7 (1989). The opposite of a precise and narrow regulation, it cannot withstand scrutiny.

I. THE RECEIPT OF FUNDS IN CONJUNCTION WITH THE DISSEMINATION OF EXPRESSIVE MATERIALS IS FULLY PROTECTED SPEECH.

This and other courts have long recognized that constitutionally protected speech includes more than oral and written expression.[1] Although perhaps not as provocative as flag-burning, *Texas v. Johnson*, 491 U.S. 397

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[1] *See, e.g., Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984) (overnight camping); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981) (nude dancing); *Tinker v. Des Moines Community School Dist.*, 393 U.S. 503 (1969) (wearing black armband); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952) (motion pictures); *Thornhill v. Alabama*, 310 U.S. 88 (1940) (picketing); *West Virginia v. Barnette*, 319 U.S. 625 (1943) (flag

(1989), or demonstrating, *Brown v. Louisiana*, 383 U.S. 131 (1966), petitioners' expressive activities are no less vital under the First Amendment. Indeed, the Court has observed that "wearing a T-shirt or button that contains a political message . . . [is] protected speech even in a non-public forum." *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 576 (1987).

The conveyance of ideas printed on T-shirts is thus constitutionally indistinguishable from promulgation of the same messages printed on paper.[2] In Justice Black's words, "[t]he basic premise of the First Amendment is that all present instruments of communication, as well as others that inventive genius may bring into being, shall be free from governmental censorship or prohibition." *Kovacs v. Cooper*, 336 U.S. 77, 102 (1949) (Black J., dissenting). Recently, the court in *Friends of the Vietnam Veterans Memorial v. Kennedy*, 899 F. Supp. 680 (D.D.C. 1995) explained that the "T-shirt has become a unique means of spreading messages over the last twenty years. Unlike a book or pamphlet, the T-shirt not only carries a message,

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salute); *Tacynec v. City of Philadelphia*, 687 F.2d 793 (3rd Cir. 1982) (marching band), *cert. denied*, 459 U.S. 1183 (1983); *Collin v. Smith*, 578 F.2d 1197 (7th Cir.) (Nazi uniform), *cert. denied*, 439 U.S. 916 (1978); *Women Strike for Peace v. Hickel*, 420 F.2d 597 (D.C. Cir. 1969) (pictorial display); *Ku Klux Klan v. Martin Luther King Worshippers*, 735 F. Supp. 745 (M.D. Tenn. 1990) (masks); *Students Against Apartheid v. O'Neil*, 660 F. Supp. 333 (W.D. Va. 1987) (wood shanties).

[2] For example, the National Organization of Women recently utilized the display of 6,000 message-bearing T-shirts on the National Mall to protest domestic violence against women. Debbi Wilgoren, *Gingrich, GOP Favorite Targets at NOW Rally*, Wash. Post, Apr. 10, 1995, at B1.

it also turns the wearer into a 'human billboard. . . . ' As such, it is an effective and inexpensive way to spread the seller's message broadly." *Id.* at 684.

Contrary to the view expressed by the panel, App. 11-12, 76 F.3d at 1014, petitioners' activities are not subject to a lesser degree of First Amendment protection simply because money is required or requested in exchange for an expressive item. *E.g. Murdock v. Pennsylvania*, 319 U.S. 105, 111 (1943) ("[T]he mere fact that religious literature is 'sold' . . . rather than 'donated,' " does not lessen the protection); *Heffron v. International Soc'y for Krishna Consciousness*, 452 U.S. 640, 650-51 (1981) (First Amendment protection not "lost because the written materials sought to be distributed are sold rather than given away"); *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 756 n.5 (1988) ("[T]he degree of First Amendment protection is not diminished merely because the newspaper or speech is sold rather than given away.").

The rationale underpinning this principle is the recognition that religious, political and charitable organizations require "funds to remain a going concern." *Murdock*, 319 U.S. at 111. "[V]irtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs." *Buckley v. Valeo*, 424 U.S. 1, 19 (1976); *see Follett v. Town of McCormick*, 321 U.S. 573, 576 (1944). This Court, therefore, "has never suggested that the dependence of communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment." *Buckley*, 424

U.S. at 16.[3] Review is thus necessary to reaffirm that the collection of funds in conjunction with the dissemination of expressive materials is at the *core* of protections afforded by the First Amendment.[4]

II. THE HONOLULU PEDDLING ORDINANCE IMPOSES AN UNPRECEDENTED BAN ON PROTECTED SPEECH AND IS SUBSTANTIALLY OVERBROAD.

A. A Complete Ban On A Medium Of Protected Expression Is The Antithesis Of Narrow Tailoring.

This Court has never sanctioned a complete ban on a medium of protected expression in a traditional public

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[3] *Cf. United States v. National Treasury Employees Union*, 115 S. Ct. 1003, 1014 (1995) ("Although § 501(b) [of the Ethics in Government Act of 1978] neither prohibits any speech nor discriminates among speakers based on the content or viewpoint of their messages, its prohibition on compensation [for making speeches or writing articles] imposes a significant burden on expressive activity.").

[4] Although the panel decision is not directly in conflict with other decisions of the courts of appeals, it does directly conflict with numerous lower court decisions, including published opinions in *Friends of the Vietnam Veterans Memorial v. Kennedy*, 899 F. Supp. 680 (D.D.C. 1995), *One World One Family Now v. City of Key West*, 852 F. Supp. 1005 (S.D. Fla. 1994), and *One World One Family Now v. Nevada*, 860 F. Supp. 1457 (D. Nev. 1994), as well as the unpublished opinion in *International Soc'y for Krishna Consciousness, Inc. v. San Diego Unified Port Dist.*, No. 91-1768-B(LSP) (S.D. Cal. Dec. 10, 1992). All of these decisions affirm the right of nonprofit groups to sell message-bearing T-shirts in tourist oriented venues closely akin to the Waikiki district, notwithstanding the existence of governmental interests identical to those raised here.

forum as vast as that at issue here. On the contrary, the Court has consistently defended the right to disseminate beliefs and ideas in quintessential public fora such as the streets and sidewalks of the Waikiki district, which ought to remain available to petitioners and others for this purpose.

The scope of the ban imposed by the Honolulu peddling ordinance encompasses, with minor exceptions,[5] the entire Waikiki district, which has "immemorially been held in trust for the use of the public and time out of mind, ha[s] been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. 496, 515 (1939) (opinion of Roberts, J.).

This Court has emphasized that in such paradigm public fora "the rights of the State to limit expressive activity are sharply circumscribed." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); *United States v. Grace*, 461 U.S. 171, 177 (1983) ("government's ability to permissibly restrict expressive conduct is very limited"). Thus, a variety of bans have been struck down, including those imposed on handbilling, *e.g.*, *Schneider v. State*, 308 U.S. 147 (1939), soliciting, *e.g.*, *Martin v. City of Struthers*, 319 U.S. 141 (1943), and marching, *e.g.*, *Gregory v. City of Chicago*, 394 U.S. 111 (1969).

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[5] The ordinance does not "apply to the sale or offer for sale of newspapers of general circulation and to duly authorized concessions in public places" Honolulu, Haw. Rev. Ordinances § 29-6.2(b) or to the "sale or offer for sale on the public sidewalks of an approved parade route of buttons and souvenir items." *Id.* at § 29-6.2(c).

"Generally directed means of communication" such as the sale of expressive T-shirts, therefore, "may not be completely banned in [public places]" such as the Waikiki district. *Frisby v. Schultz*, 487 U.S. 474, 486 (1988); *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516, 2527 (1994). Indeed, this Court has frequently

> voiced particular concern with laws that foreclose an entire *medium* of expression. . . . Although prohibitions foreclosing entire media may be completely free of content or viewpoint discrimination, the danger they pose to the freedom of speech is readily apparent – by eliminating a common means of speaking, such measures can suppress too much speech.

City of Ladue v. Gilleo, 114 S. Ct. 2038, 2045 (1994) (citations and footnotes omitted) (emphasis added).

This is precisely the situation here. Although the panel majority acknowledged petitioners' First Amendment right to sell message-bearing merchandise, App. 6, 76 F.3d at 1012, it did so only in a way that is "destined to be futile." *International Soc'y for Krishna Consciousness v. Griffin*, 437 F. Supp. 666, 672 (W.D. Pa. 1977). Without the ability to sell petitioners cannot possibly produce the expressive T-shirts which they disseminate, and continue to fund their other activities. Thus, in Judge Pregerson's words, the decision below merely "gives lip service" to the important constitutional rights at stake in this case, App. 19, 76 F.3d at 1021, and must be corrected.

B. The City's Asserted Interests Do Not Support A Complete Ban On Petitioners' Expression.

The exercise of First Amendment rights may not be broadly prohibited in a public forum in order to avoid pedestrian traffic congestion. *See, e.g., Fernandes v. Limmer*, 663 F.2d 619, 626 (5th Cir. Unit A 1981) (literature distribution and soliciting in airport concourse), *cert. dismissed*, 458 U.S. 1124 (1982); *Multimedia Publishing Co. v. Greenville-Spartanburg Airport Dist.*, 991 F.2d 154, 162 (4th Cir. 1993) (newsracks in airport terminal); *Wolin v. Port of New York Auth.*, 392 F.2d 83, 90 (2d Cir.) (leafletting and soliciting in bus terminal), *cert. denied*, 393 U.S. 940 (1968); *One World One Family Now v. City of Key West*, 852 F. Supp. at 1011 (sale of message-bearing T-shirts on "crowded public sidewalks" of Key West commercial district).

Nor may expressive activities be completely banned in order to satisfy aesthetic concerns, *e.g., Multimedia Publishing Co.*, 991 F.2d at 161; *Globe Newspaper Co. v. Beacon Hill Architectural Ass'n*, 847 F. Supp. 178, 194-95 (D. Mass. 1994); *Southern New Jersey Newspapers, Inc. v. New Jersey Dep't of Transp.*, 542 F. Supp. 173, 186-87 (D.N.J. 1982), except where the aesthetic harm is both substantial and widely recognized, and the property at issue is a nonpublic forum. *See Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 805 (1984). Aesthetic issues, moreover, "are necessarily subjective, defying objective evaluation, and for that reason must be carefully scrutinized to determine if they are only a public rationalization of an impermissible purpose." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 510 (1981) (plurality opinion).

The City's unprecedented interest in purportedly protecting local merchants from unfair competition from nonprofit organizations may also not serve to "obscure the first amendment interests at stake." *U.S. S.W. Afr./ Namibia Trade & Cultural Ass'n v. United States*, 708 F.2d 760, 767 (D.C. Cir. 1983). Indeed, recognition of such an interest would visit havoc upon First Amendment values by making commercial activities paramount to the exercise of protected liberties. The government, consequently, would be permitted to ban the sale of girl scout cookies to protect grocery stores from unfair competition, not to speak of literature distribution to protect the interests of local book stores.

For this reason, the Court has warned in a closely analogous context that "requir[ing] a parity of constitutional protection for commercial and non-commercial speech alike could invite dilution, simply by a leveling process, of the force of the [First] Amendment's guarantee with respect to the latter kind of speech." *Ohralick v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978); *accord Board of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469 (1989).[6]

And, the panel decision ignores the reality that the City's interests are already compromised by the activities

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[6] *See also Van Allsburg v. City of Kansas City*, 600 F. Supp. 1226, 1232-33 (W.D.Mo. 1984) ("If having a vendor sell recreation-related articles purely for personal profit is allowed under the present policies as not unduly commercializing the parks, the Court is convinced that the nature, function, order, and beauty of parks can be preserved by restrictions significantly less onerous than a total ban on fundraising.").

that regularly occur in the heavily urbanized Waikiki district, and that the ban on T-shirt sales would not have any appreciable impact on achieving respondents' articulated goals. *See, e.g., Henderson v. Lujan*, 964 F.2d 1179, 1185 (D.C. Cir. 1992); *United States v. Doe*, 968 F.2d 86, 89 (D.C. Cir. 1992); *Southern New Jersey Newspapers, Inc.*, 542 F. Supp. at 186-87.

C. The Panel Erred In Not Considering The Numerous And Less-Burdensome Alternatives To The Ban On Sales.

To satisfy the narrow tailoring requirement, a regulation "need not be the least restrictive or least-intrusive means" of serving the government's interest. *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989). However, a regulation that "burden[s] substantially more speech than is necessary to further the government's legitimate interests" is not "narrowly tailored" *id.* at 799, particularly where "there are numerous and obvious less-burdensome alternatives to the restriction on . . . speech." *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1510 n.13 (1993); *see Fox*, 492 U.S. at 479 (1989).[7]

Petitioners, as well as the dissent, proposed a number of realistic, obvious and less-burdensome alternatives to the sales ban that were summarily brushed aside by the

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[7] This aspect of the narrow-tailoring requirement has been frequently followed in the courts of appeals. *E.g., Chesapeake & Potomac Tel. Co. v. United States*, 42 F.3d 181, 199-202 (4th Cir. 1994); *Multimedia Publishing Co. v. Greenville-Spartanburg Airport Dist.*, 991 F.2d 154, 161 (4th Cir. 1993); *Project 80's, Inc. v. City of Pocatello*, 942 F.2d 635, 638 (9th Cir. 1991).

majority. App. 11, 76 F.3d at 1014. For example, in order to reduce the irritation of local merchants (an interest which petitioners vigorously contest) the City could limit *sales* activities to qualified nonprofit organizations, or their noncommercial equivalent, and require representatives of such organizations to "establish [their] identit[ies] and [their] authority to act for the cause which [they] purport[ ] to represent." *Cantwell v. Connecticut*, 310 U.S. 296, 306 (1940). The City could also require any merchandise sold by such organizations to be either inherently communicative, or to contain a message of intellectual content that is inextricably intertwined with a statement carrying a religious, political, philosophical or ideological message. *See Gaudiya Vaishnava Soc'y*, 952 F.2d at 1066. The use of commercial signs and displays could also be restricted.

The City's aesthetic interest (to the extent that any such interest exists) can be preserved by restricting expressive activities to frequently used commercialized areas of the Waikiki district and by regulating the size, use and appearance of structures and other paraphernalia used in conjunction with such activities. *Cf. Discovery Network Inc.*, 113 S. Ct. at 1510 (City may preserve attractiveness of its streets by regulating "size, shape, appearance, or number" of newsracks); *Multimedia Publishing Co.*, 991 F.2d at 161 (aesthetic design of airport can be protected from "visual clutter" by regulating location and design of newsracks); *Beacon Hill Architectural Ass'n*, 847 F. Supp. at 194-95 (architectural, historic and aesthetic character of Beacon Hill District can be preserved by regulating size, shape, appearance and location of newsracks and other structures).

Interference with pedestrian traffic flow could be prevented by limiting the size and number of tables and other structures used to display expressive T-shirts, and by avoiding heavily congested areas such as intersections and the entrances and exits of commercial establishments. And, in the unlikely event that the number of permit applicants exceeds the number of available sites, the City could employ a rotation system whereby each applicant is provided equal access on a controlled basis.

By ignoring these " 'far less restrictive and more precise means' " for accomplishing its goals, *Fox*, 492 U.S. at 479 (quoting *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 476 (1988)), respondents have failed to narrowly tailor the peddling ordinance to serve their legitimate interests.

III. THE PANEL ERRED IN FINDING THE EXISTENCE OF SIGNIFICANT GOVERNMENTAL INTERESTS THROUGHOUT THE WAIKIKI DISTRICT IN THE ABSENCE OF ANY EVIDENCE.

Although the district court found that the City established its interests on Kalakaua and Kuhio Avenues, it specifically concluded that the City did "not offer[ ] any evidence as to how any of [its] interests are advanced by completely banning T-shirt sales throughout the remainder of Waikiki." App. 49. Dismissing this finding of fact, the court of appeals advanced the novel proposition that "[c]ities need not prove up their interests on a block-by-block basis, particularly where the interests asserted are as basic and traditional as Honolulu's" App. 14, 76 F.3d at 1015. The panel also held that petitioners, rather than the City, had the burden of making a "strong showing to the

contrary." App. 15, 76 F.3d at 1015. This Court has never sanctioned such an approach.

> When the Government defends a regulation on speech as a means to redress past harms or prevent future harms, it must do more than simply "posit the existence of the disease to be cured." . . . *It must demonstrate* that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.

Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445, 2470 (1994) (plurality opinion) (emphasis added) (citations omitted); *cf. 44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, 1509 (1996) ("[T]he State bears the burden of showing not merely that its regulation will advance its interest, but also that it will do so 'to a material degree.' ") (citation omitted).

In *Grace*, for example, a ban on carrying signs on the perimeter sidewalks of the Supreme Court building was held invalid, in part, because the government's interests in protecting persons and property on the grounds and in maintaining proper order and decorum were not sufficiently threatened to warrant a complete restriction. There was "no suggestion, for example, that appellees' activities in any way obstructed the sidewalks or access to the building, threatened injury to any person or property, or in any way interfered with the orderly administration of the building or other parts of the grounds." 461 U.S. at 182.

The approach employed by the panel was also rejected in *Madsen*. There, the Court upheld a speech free buffer zone within 36 feet of the property line of an

abortion clinic "as a way of ensuring access to the clinic." *Id.* at 2526. With respect to buffer zones created on property abutting the clinic, however, the Court observed that "nothing in the record indicates that petitioners' activities on the [adjacent] private property have obstructed access to the clinic. Nor was evidence presented that protestors located on the private property blocked vehicular traffic." The Court thus concluded on the record before it that "the 36-foot buffer zone as applied to the private property to the north and west of the clinic burdens more speech than necessary to protect access to the clinic." *Id.* at 2528.

In the same way, nothing in the record of this case supports the panel's contention that the City's interests on Kalakaua and Kuhio Avenues may be "presumed to operate" throughout the remainder of Waikiki. App. 15, 76 F.3d at 1015. The district court made no such finding, and observed to the contrary that the City did not present evidence "to support . . . a total ban for all of Waikiki" App. 49, and did "not show[ ] how its . . . interests are advanced by a total ban of all expressive T-shirt sales in Waikiki." App. 52.

The panel also erred in placing the burden on petitioners to negate the existence of the City's interests, rather than on respondents to affirmatively establish their existence. "[S]ince the State bears the burden of justifying its restrictions, . . . it must affirmatively establish the reasonable fit we require." *Fox*, 492 U.S. at 480.

IV. THE PEDDLING ORDINANCE DOES NOT LEAVE OPEN AMPLE ALTERNATIVE CHANNELS OF COMMUNICATION.

"[E]ven regulations that do not foreclose an entire medium of expression, but merely shift the time, place, or manner of its use, must 'leave open ample alternative channels for communication.' " *City of Ladue*, 114 S. Ct. at 2046. The Court has thus held invalid regulations that prevent the speaker from using a "unique and important" mode of expression for which there is "no practical substitute." *Id.* at 2045. An alternative is also not ample or adequate if the speaker is not permitted to reach the 'intended audience.' " *Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1229 (9th Cir. 1990).

In the present case, the Honolulu peddling ordinance allows the free distribution of message-bearing T-shirts. Without the ability to sell, however, petitioners have no way of paying for the literature and T-shirts which they distribute or supporting their respective causes. The court in *Friends of the Vietnam Veterans Memorial* thus emphasized that "[a]llowing groups to give away T-shirts is not an ample alternative means of communication. Few non-profit groups can afford to give away large numbers of message-bearing T-shirts, which cost money to design, print and produce." 899 F. Supp. at 685. The court further observed that "[t]he sale of T-shirts is . . . the primary means by which many . . . groups are able to raise money in order to continue to engage in spreading their message." *Id.* The Honolulu peddling ordinance thus deprives petitioners of a "unique and important" mode of expression for which there is "no practical substitute."

The ordinance also fails to provide an alternative *location* where plaintiffs can contact the audience that they would otherwise find in the Waikiki district. Restrictions have been upheld, for example, where the challenged ordinance "does not affect the [speaker's] freedom to exercise the right to speak and distribute literature *in the same place* where the posting of signs on public property is prohibited," *Taxpayers for Vincent*, 466 U.S. at 812 (emphasis added), and the regulation "has not been shown to deny access within the forum in question." *Heffron*, 452 U.S. at 655.

In *Heffron*, therefore, the Court upheld a rule restricting soliciting and the distribution of literature to a booth within the Minnesota State Fairgrounds. The Court stressed that the restriction did not completely ban ISKCON's expressive activities, but rather confined them to a specific area "where visitors are expected, and indeed encouraged, to pass." 452 U.S. at 655 n.16. Here, in contrast, petitioners do not have an alternative location within the relevant forum, as did the Krishnas in *Heffron*. Rather, petitioners are totally excluded from the entire Waikiki area, which is the only viable place where they can reach their intended audience. "[S]erious questions [thus] exist as to whether the ordinance 'leave[s] open ample alternative channels for communication.' " *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 93 (1977) (quoting *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (1976)).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ONE WORLD ONE FAMILY NOW, a Hawaii non-profit corporation; JAMES MCDONOUGH; BHAKTIVEDANTA MISSION, LTD., a Hawaii non-profit corporation; ANTON VOIGHT, *Plaintiffs-Appellants,* v. CITY AND COUNTY OF HONOLULU; FRANK F. FASI, individually and in his capacity as Mayor of the City and County of Honolulu; MICHAEL NAKAMURA, Chief of Police; DONNA WOO, individually and in her capacity as Special Deputy Attorney General of the State of Hawaii; and JOHN DOES 1-10, *Defendants-Appellees.*	No. 94-16373 D.C. No. CV-94-00395-HMF OPINION
ONE WORLD ONE FAMILY NOW; JAMES MCDONOUGH, an individual; BHAKTIVEDANTA MISSION, LTD., a Hawaii non-profit corporation; ANTON VOIGHT, *Plaintiffs-Appellees,* v. CITY AND COUNTY OF HONOLULU; FRANK F. FASI, individually and in his capacity as Mayor of the City and County of Honolulu; MICHAEL NAKAMURA, Chief of Police, *Defendants-Appellants.*	No. 94-16511 D.C. No. CV-94-00395-HMF

Appeals from the United States District Court
for the District of Hawaii
Harold M. Fong, Chief Judge, Presiding

Argued and Submitted
May 2, 1995 – Honolulu, Hawaii

Filed February 13, 1996

Before: Harry Pregerson, Alex Kozinski and
Michael Daly Hawkins, Circuit Judges.

Opinion by Judge Kozinski; Dissent by Judge Pregerson

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OPINION

KOZINSKI, Circuit Judge.

An ordinance prohibits the sale of merchandise on city streets. We must determine whether it may be constitutionally applied to bar non-profit organizations from selling message-bearing T-shirts.

I

Plaintiffs One World One Family Now and Bhaktivedanta Mission are non-profit corporations operating in Hawaii. Both organizations sell T-shirts imprinted with various philosophical and inspirational messages, such as "Protect and Preserve the Truth, the Beauty & Harmony of our Native Cultures," Ex. 3, "TAKE IT EASY MEDITATE HANG LOOSE HAWAII," Ex. 4, and "WAIKIKI HAWAII HARINAM," Ex. 6.[1] Many of the T-shirts feature colorful depictions of Hawaii's scenic natural beauty, not unlike shirts sold in retail stores catering to tourists. Plaintiffs believe that selling T-shirts is a particularly effective way to communicate because those who buy and wear the T-shirts help spread the message.

Aiming for a wide audience, plaintiffs, along with a number of commercial T-shirt vendors, set up several display tables on the sidewalks of Kalakaua Avenue, one of the busiest commercial streets in Waikiki.[2] The City

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[1] "Harinam" apparently means "chant the name of god" in Sanskrit. Appellee's Br. at 5.

[2] Waikiki is a relatively small, self-contained district within the city of Honolulu, comprising approximately 500 acres.

and County of Honolulu soon began to hear from visitors and local residents who complained that the T-shirt tables were an obstruction and an eyesore. Merchants with stores near the T-shirt tables also complained, citing a drop in their own sales of tourist-oriented merchandise, which they attributed to unfair competition from the sidewalk vendors.

The city notified the sidewalk vendors (including plaintiffs) that they were violating Honolulu, Haw., Rev. Ordinances § 29-6.2(b)(7), which bans the sale of all "goods, wares, merchandise, foodstuffs, refreshments or other kinds of property or services . . . upon the public streets, alleys, sidewalks, malls, parks, beaches and other public places in Waikiki." After police threatened them with citations for failure to comply, plaintiffs sued for declaratory and injunctive relief under 42 U.S.C. § 1983, claiming that section 29-6.2 violated their First Amendment rights, and moved for a preliminary injunction.

The district court held an evidentiary hearing. Finding that the city was regulating the time, place and manner of speech pursuant to legitimate and significant interests, it refused to enjoin enforcement of the ordinance as to Kalakaua and Kuhio Avenues – the heart of Waikiki's commercial area and the focus of the city's evidence. The district court granted a preliminary injunction against enforcement of the ordinance in the rest of Waikiki, holding that the city hadn't shown a sufficient interest in keeping plaintiffs from selling there, or that

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Within it one can find, on any given day, the highest concentration of tourists in the city. It also has a large residential population.

doing so would leave adequate alternative means of communication. Both sides appeal.

II

Because the focus of the litigation has been on Kalakaua and Kuhio Avenues, we deal first with the district court's decision not to enjoin enforcement of the ordinance there.

A

Before we decide which standard to use in evaluating the ordinance, we dispose of a preliminary matter: the application here of our decision in *Gaudiya Vaishnava Soc'y v. City and County of San Francisco*, 952 F.2d 1059 (9th Cir. 1990), *cert. denied*, 504 U.S. 914 (1992). Plaintiffs argue that, under *Gaudiya*, their selling is constitutionally protected expression. The city claims plaintiffs' activities aren't constitutionally protected at all.

In *Gaudiya*, we addressed two questions, one of first impression, the other not. The novel question was whether an ordinance prohibiting charitable organizations from selling message-bearing merchandise implicated the First Amendment. Rejecting San Francisco's contention that selling goods was unprotected conduct, we held that, when the sale of merchandise bearing political, religious, philosophical or ideological messages is "inextricably intertwined" with other forms of protected expression (like distributing literature and proselytizing), the First Amendment applies. *Id.* at 1064. The mundane question followed: Whether San Francisco's ordinance

facially violated the First Amendment by giving the police chief unbridled discretion to grant or deny peddling permits for an activity protected by the First Amendment. Following a well-worn path, *see City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 756-57 (1988) (collecting cases), we held the ordinance facially invalid. 952 F.2d at 1065-66.

Plaintiffs' activities closely resemble those in *Gaudiya* and the First Amendment therefore protects them. But there ends the similarity. In *Gaudiya*, the ordinance granted the police chief unbridled discretion to grant peddling permits and the plaintiffs there brought a facial challenge to this discretion. By contrast, Honolulu's ordinance is a flat ban; there are some exceptions, but no discretion to be exercised. Accordingly, on appeal, plaintiffs challenge section 29-6.2 only as applied to their activities.[3]

B

Having determined that plaintiffs' T-shirt sales fall within the ambit of the First Amendment, we must decide whether Honolulu's ordinance is valid as applied to them. We use the standard governing time, place and manner restrictions.[4] Such restrictions are valid if they (1)

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[3] Below, plaintiffs purported to bring a facial challenge, as well. We assume they don't appeal the district court's rejection of their facial challenge as they make no arguments to support such a challenge.

[4] The city doesn't dispute that the sidewalks of Waikiki are a public forum, nor could it. *See, e.g., United States v. Grace*, 461 U.S. 171, 177 (1983).

are content-neutral; (2) are narrowly tailored to serve a significant governmental interest; and (3) leave open ample alternative channels of communication. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

1. A speech restriction is content-neutral if it is "justified without reference to the content of the regulated speech." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward*, 491 U.S. at 791. The test is whether the government has adopted the restriction "because of disagreement with the message it conveys." *Id.*

The district court found that the ordinance furthers three legitimate governmental interests: (1) "maintaining the aesthetic attractiveness of Waikiki," (2) "promoting public safety and the orderly movement of pedestrians," and (3) "protecting the local merchant economy." E.R. at 31. None of these interests concerns the content of speech, and there's no evidence that "the ordinance was designed to suppress certain ideas that the City finds distasteful or that it has been applied to [the plaintiffs] because of the views that they express." *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984). The ordinance imposes a flat ban, one that is applied without regard to content. Accordingly, it is content-neutral.[5]

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[5] Plaintiffs argue that the ordinance provides several exemptions that have the effect of discriminating on the basis of

2. Cities have a substantial interest in protecting the aesthetic appearance of their communities by "avoiding visual clutter." *Id.* at 806-07. As the district court found, Honolulu's interest in eliminating the visual blight caused by unsightly vendor stands easily qualifies under this standard. Likewise, cities have a substantial interest in assuring safe and convenient circulation on their streets. *See Cox v. Louisiana*, 379 U.S. 536, 554-55 (1965). The district court found that Waikiki is the center of the state's tourism industry, receives as many as 60,000 visitors a day, and consequently has "a large concentration of vehicles and pedestrians which causes unique traffic problems." E.R. at 11. Judged in light of "the characteristic nature and function of the particular forum involved," *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 651 (1981), the city's interest in maintaining the orderly movement of pedestrians on Waikiki's crowded sidewalks is also substantial. *See* Appendix.

Finally, Honolulu has demonstrated a substantial interest in protecting local merchants from unfair competition. *See Turner Broadcasting Sys., Inc. v. F.C.C.*, 114 S. Ct. 2445, 2469-70 (1994). One legitimate preoccupation of local government is to attract and preserve business. Cities rely on a prosperous, stable merchant community

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content. Its provisions do not apply to the "sale . . . of newspapers of general circulation and to duly authorized concessions in public places." Honolulu, Haw., Rev. Ordinances § 29-6.2(b). The provision also exempts buttons and souvenir items sold in conjunction with a parade. *Id.* § 29-6.2(c). Because these exemptions don't enable the city to discriminate against ideas it disfavors, they don't render the ordinance content-based. *See Leathers v. Medlock*, 499 U.S. 439, 450 (1991).

for their tax base, as well as for the comfort and welfare of their citizens. Here, the district court found that "the tax-free and rent-free activities of the plaintiffs . . . have had a significant affect [sic] on the economy of the abutting shop owners on Kalakaua and Kuhio Avenues whose taxes and rent contribute to the welfare and economy of this state." E.R. at 35. This kind of unfair competition threatens to erode tax revenues and undermine the strength of its commercial life.[6] As amici remind us, plaintiffs can offer "remarkably low prices" in part because they pay no rent and aren't subject to various municipal regulations. Given the district court's findings, we must take seriously the concern that "[n]o ordinary merchant, forced to pay rent in Waikiki and comply with other applicable laws, possibly could compete with those prices for any significant period of time." Br. Amici Curiae at 20.

Given the evidence before it and the deference due the city council's determinations of necessity, *see Turner Broadcasting*, 114 S. Ct. at 2470-71 (plurality opinion),[7] the

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[6] Plaintiffs contend that the city failed to offer any concrete evidence demonstrating that their T-shirt sales actually harmed local merchants. But "the validity of [a time, place or manner] regulation depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interests in an individual case." *Ward*, 491 U.S. at 801.

[7] Although this portion of Justice Kennedy's opinion had only four votes, under *Marks v. United States*, 430 U.S. 188, 193 (1977), it's the holding of the case, since it was the "position taken by those members who concurred in the judgment[ ] on the narrowest grounds." *See Turner Broadcasting*, 114 S. Ct. at 2473-75 (advocating greater deference).

district court didn't err in concluding that the city had actual, significant interests. *See id.* at 2470 (plurality opinion) (requiring finding that "recited harms are real, not merely conjectural" to establish significant government interest); *cf. id.* at 2472-73 (Blackmun, J., concurring), 2473-75 (Stevens, J., concurring).[8]

Honolulu's peddling ordinance is narrowly tailored to serve these interests because they "would be achieved less effectively absent the regulation." *Ward*, 491 U.S. at 799 (internal quotation marks omitted). Without the ordinance, sidewalk vendors (commercial and charitable alike) would be free to peddle their wares on Kalakaua and Kuhio Avenues, undermining the city's efforts to provide a pleasant strolling and shopping area. *See* Appendix. A proliferation of sidewalk vendors could also aggravate the congestion on already crowded sidewalks and siphon off sales from local merchants. Because the peddling ordinance addresses these problems "without . . . significantly restricting a substantial quantity of speech that does not create the same evils," *id.* at 799 n.7, section 29-6.2(b)(7) is narrowly tailored.[9]

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[8] The district court didn't clearly err in finding that the city showed insufficient evidence that sidewalk vending was actually "causing a proliferation of fraud and duress among tourists and residents." E.R. at 31. In any case, an ordinance that bans all sidewalk vending isn't narrowly tailored to eliminate fraud. *Cf. Martin v. City of Struthers*, 319 U.S. 141, 144-49 (1943) (ban on door-to-door handbilling not narrowly tailored to prevent crime and fraud).

[9] The ordinance doesn't stop anyone from handing out T-shirts free of charge. This, plaintiffs argue, makes the ordinance invalid because handing out T-shirts causes the same harm to the city's interests as selling them. The city, however,

Plaintiffs suggest less restrictive alternatives Honolulu could adopt to advance its interests, such as limiting the number of vendors, their hours of operation or the size and location of their stands. A reasonable time, place and manner regulation, however, need not be the "least restrictive or least intrusive" alternative. *Id.* at 798. "So long as the means chosen are not substantially broader than necessary to achieve the government's interest, . . . the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Id.* at 800.

Honolulu's peddling ordinance isn't "substantially broader than necessary" to achieve its interests. The ordinance targets precisely the activity – sidewalk vending – causing the problems the city legitimately seeks to ameliorate, and it doesn't sweep in expressive activity that doesn't contribute to those problems. As in *Vincent*, the city "did no more than eliminate the exact source of the evil it sought to remedy." 466 U.S. at 808.

3. Honolulu's peddling ordinance also leaves open ample alternative channels of communication. The ordinance forecloses one narrow form of expression – sidewalk sales of message-bearing merchandise – and leaves

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was entitled to conclude that fewer sidewalk vendors would come to hand out merchandise for free. The ordinance is therefore a "valuable, but perhaps imperfect" means of addressing the targeted problem. *Clark*, 468 U.S. at 297; *cf. Vincent*, 466 U.S. at 811 ("Even if some visual blight remains, a partial, content-neutral ban may nevertheless enhance the City's appearance.").

the plaintiffs free to disseminate and seek financial support for their views through "myriad and diverse" alternative channels, such as handing out literature, proselytizing or soliciting donations. *See ACORN v. City of Phoenix*, 798 F.2d 1260, 1271 (9th Cir. 1986) (ordinance prohibiting charitable solicitation from people in cars leaves open ample alternative channels of communication). In addition, plaintiffs' volunteers may hand out free T-shirts to passers-by, *see* note 8 *supra*, or mingle with Waikiki's tourist throngs wearing T-shirts (thereby acting as human billboards). Plaintiffs may also sell T-shirts through local retail outlets or by opening their own stores, so long as they comply with the regulations generally applicable to merchants.

Plaintiffs argue we must nevertheless invalidate the peddling ordinance because it prevents them from reaching their intended audience. They rely heavily on *Bay Area Peace Navy v. United States*, 914 F.2d 1224 (9th Cir. 1990), where we invalidated the Coast Guard's 75-yard security zone around the Aquatic Park Pier during annual Fleet Week activities on San Francisco Bay. We noted that the security zone effectively prevented the plaintiff from reaching its intended audience (military officers, local government officials and other dignitaries) because its protest messages couldn't reach observers on the pier over 75 yards away. *Id.* at 1229-30. We emphasized that other channels of communication – passing out pamphlets or holding demonstrations on land – were "not viable alternatives because the invited visitors, who are the Peace Navy's intended audience, are not accessible from those positions." *Id.* at 1229 (internal quotation marks omitted).

Bay Area Peace Navy is inapposite. Nothing prevents plaintiffs here from reaching their intended audience – the tourists congregating in Waikiki. As noted, they have a number of alternative means of disseminating their message, each of which allows them to communicate effectively with people on the sidewalks.

Finally, plaintiffs claim that the Supreme Court's recent decision in *City of Ladue v. Gilleo*, 114 S. Ct. 2038 (1994), casts doubt on the validity of the ordinance. In *Ladue*, the Court struck down a broad ban on the display of signs on private residential property. The opinion rested heavily on the view that the city's ordinance closed off a "unique and important" mode of expression for which there is "no practical substitute." *Id.* at 2045-46. The Court explained that "[d]isplaying a sign from one's own residence often carries a message quite distinct from placing the same sign someplace else, or conveying the same text or picture by other means." *Id.* at 2046.

Plaintiffs argue that selling message-bearing T-shirts is a unique mode of expression akin to displaying a sign in front of one's home. We are not persuaded. While *wearing* a message-bearing T-shirt might be a uniquely valuable mode of communication whose total ban could raise serious constitutional questions, *cf. Cohen v. California*, 403 U.S. 15 (1971), the same can't be said for *selling* such a T-shirt on the sidewalk. A message on one's person or home has a unique effect because it "provide[s] information about the identity of the 'speaker' [which is] an important component of many attempts to persuade." *Ladue*, 114 S. Ct. at 2046. While selling T-shirts is a unique form of expression in the sense that serving message-bearing raviolis or preaching on street corners in a

Donald Duck voice would be unique, it does nothing to make the message uniquely significant or effective. Various other traditional means of dissemination would get across exactly the same idea. Thus, we do not believe the sale of message-bearing T-shirts is so "uniquely valuable or important [a] mode of communication" as to be without effective substitute. *Vincent*, 466 U.S. at 812.

III

Although the district court refused to enjoin enforcement of the ordinance on Kalakaua and Kuhio Avenues, it granted a preliminary injunction for the rest of Waikiki, finding that the city had proved its interest only as to these two streets. E.R. at 31-35. Neither party asked for this Solomonic solution and, on appeal, both correctly argue that the district court erred in differentiating between Waikiki's main and side streets. Cities need not prove up their interests on a block-by-block basis, particularly where the interests asserted are as basic and traditional as Honolulu's. *See, e.g., Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507-08 (1981). The evidence before the district court focused on Kalakaua Avenue because that's where most of the sidewalk vendors were operating. *See* Deposition of James McDonough at 37-38; Deposition of Anton Voight at 61-62. There was ample evidence, though, that the city's interests in open and attractive sidewalks and fair competition extended throughout Waikiki. *See, e.g.*, E.R. at 11-12 (district court's findings indicating Waikiki's history of special treatment in city ordinances); Defendant's Ex. 8 at 43-55 (1992 Waikiki Master Plan indicating plans to improve and beautify streets throughout Waikiki); R.T. at 168-69 (testimony that

landowners wouldn't make crucial concessions to allow further implementation of Master Plan if widened and beautified sidewalks would be inhabited by sidewalk vendors). Indeed, these types of interests can be presumed to operate throughout a city, absent a strong showing to the contrary.

The district court also found that a ban throughout Waikiki didn't leave ample alternative channels for plaintiffs to communicate their messages. Citing *Clark* and *Gaudiya*, it reasoned that a "total ban on selling expressive T-shirts in a heavily trafficked section of town" was impermissible. E.R. at 32-33. Neither we nor the Supreme Court have said any such thing. Rather, we have held broad and narrow bans in even the most desirable locations to the same standard. The broader the ban, of course, the more difficult it is to prove that the remaining means of communication are adequate. Difficult, however, doesn't mean impossible. As discussed above, this ordinance meets the test.

Accordingly, plaintiffs showed no likelihood of success on the merits and the district court erred in granting their motion for a preliminary injunction, even in part. *See Senate of California v. Mosbacher*, 968 F.2d 974, 977-78 (9th Cir. 1992).

* * *

Honolulu's peddling ordinance is content-neutral, narrowly tailored to serve substantial interests throughout Waikiki, and leaves ample alternative channels of communication. We therefore **AFFIRM** the partial denial of plaintiff's motion for a preliminary injunction on its enforcement on Kalakaua and Kuhio Avenues and

VACATE the preliminary injunction on its enforcement in other areas of Waikiki.

AFFIRMED IN PART; REVERSED IN PART.

[Photographs Omitted In Printing]

PREGERSON, Circuit Judge, dissenting:

Because I believe the First Amendment protects the right to speak freely in a public forum, I dissent. Two aspects of the majority opinion are troublesome. First, the majority opinion diminishes the free speech right at stake here by narrowing the scope of our decision in *Gaudiya Vaishnava Society v. City of San Francisco*, 952 F.2d 1059 (9th Cir. 1990), *cert. denied*, 112 S. Ct. 1951 (1992). Second, the majority's time, place, and manner analysis rubber-stamps Honolulu's ordinance restricting speech even though (a) the ordinance is not narrowly tailored to achieve Honolulu's civic goals, and (b) no equally effective alternative forum for the restricted speech exists. I address each concern in turn.

I

The majority recognizes that the plaintiffs' T-shirt sales fall within the protective ambit of the First Amendment. Nevertheless, the majority's analysis gives short shrift to our important discussion in *Gaudiya* concerning the substance of the right to speak in a public forum, which includes the right to sell message-bearing T-shirts.

In *Gaudiya*, we held that merchandise with messages affixed to the product, "when sold in conjunction with other activities in order to disseminate [an] organizations' message . . . is fully protected speech." 952 F.2d at 1064-65. There, various nonprofit organizations challenged a San Francisco ordinance that prohibited selling, without a permit, T-shirts and other message-bearing merchandise at Fisherman's Wharf and Union Square. *Id.* at 1060-61. The messages conveyed – verbally or symbolically – the nonprofits' philosophies. *Id.* at 1060. The sale of message-bearing merchandise at high foot-traffic locations helped the nonprofits solicit donations, distribute literature, and educate the public about their causes. *Id.*

As in *Gaudiya*, the T-shirts at issue here bear messages that convey the religious and political philosophies of the plaintiff organizations. Some of the T-shirts read: "Meditate," "Clean and Safe Oceans for All," and "Protect and Preserve the Truth, the Beauty & Harmony of our Native Cultures." Just because the messages are printed along with pictures of flowers or fish does not diminish the religious or political quality of the speech. The messages on the merchandise in *Gaudiya* were also intermingled with aesthetic design, but we nevertheless found that the sale of the merchandise was "inextricably intertwined" with fully protected speech. *Gaudiya*, 952 F.2d at 1064 n.5.

Also, as was true of the San Francisco nonprofits, the plaintiffs here distribute information about their philosophies in conjunction with selling message-bearing T-shirts. The ultimate purpose of these T-shirt transactions is the dissemination of passionately-held viewpoints. The people manning the T-shirt stands discuss

their religious beliefs and philosophies with anyone who stops by.[1]

Contrary to the majority's view, *Gaudiya* controls the disposition of the case at hand. It is true that *Gaudiya* struck down San Francisco's permit requirement because of its lack of "rules that give guidance to the chief of police." *Gaudiya*, 952 F.2d at 1065. But we didn't strike down the permit requirement merely because it was police-administered. We were concerned with San Francisco's unbridled restriction of free speech in the absence of a rational set of operating procedures; and, we looked to whether the city had given its chief of police guiding rules for restricting speech. *Id.* at 1065-66.

Applying *Gaudiya* to this case is not difficult. Under *Gaudiya*, Honolulu could have easily avoided running afoul of the First Amendment by instituting guiding rules under which nonprofits could sell their message-bearing T-shirts. But Honolulu imposed a blanket ban on such sales. This ban amounts to an unlimited governmental restriction of speech in a public forum – in substance, the same kind of governmental action condemned in *Gaudiya*. As in *Gaudiya*, there is no need here for Honolulu's unbridled ban on First Amendment activities. *See Gaudiya*, 952 F.2d at 1065. Yet the majority minimizes any

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[1] The plainclothes officer who investigated the T-shirt stands testified that he had a "good" conversation with an "active" member of the Bhaktivedanta Mission, who shared his religious beliefs with the officer and read aloud parts of a handout on these beliefs. The officer also testified that three organizations, including One World One Family Now, distributed literature to him.

substantive similarity between Honolulu's blanket ban and San Francisco's unchecked permit scheme.

The majority opinion does not explain adequately its departure from *Gaudiya*. On the one hand, the majority acknowledges that plaintiff organizations have a "fully protected" speech right. But on the other hand, the majority fails to recognize Honolulu's duty to respect and preserve that right for it to be effective. In so doing, the majority's position only gives lip service not only to *Gaudiya*, but also to the Supreme Court's strong admonitions that message-bearing merchandise, when sold in conjunction with other First Amendment activities, is *fully protected* speech. *See Heffron v. International Soc'y for Krishna Consciousness*, 452 U.S. 640, 647 (1981). *See also Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973) (stating that newspaper's profit motive should not be the basis for regulation of First Amendment rights); *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980) (holding that charitable appeals for funds in conjunction with other First Amendment activities are protected).

Underlying the majority opinion may be the notion that the nonprofits are using the First Amendment to protect a niche in the Waikiki T-shirt market. If this is so, then the matter should be remanded for further findings of fact. Without a more complete record, an unsupported suspicion that the T-shirt stands are a sham should not be the basis for circumventing the First Amendment.

II

The majority opinion's time, place, and manner discussion is thin. The majority summarily concludes that Honolulu's ordinance is content-neutral, is narrowly tailored to serve a significant governmental interest, and leaves ample alternative channels of communication. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). The last two conclusions are questionable.

A

To satisfy the narrowly tailored requirement, a regulation need not be the "least restrictive" means of serving the relevant government interest, but "if there are numerous and obvious less-burdensome alternatives to the restriction on . . . speech, that is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable." *City of Cincinnati v. Discovery Network, Inc.*, ___ U.S. ___, 113 S. Ct. 1505, 1510 n.13 (1993). Indeed, as we concluded in *Project 80's, Inc. v. City of Pocatello*, 942 F.2d 635, 638 (9th Cir. 1991), "restrictions which disregard far less restrictive and more precise means are not narrowly tailored."

Honolulu claims that it enacted the peddling ordinance to maintain the aesthetic attractiveness of Waikiki, promote public safety and orderly movement of pedestrians, protect the local merchant economy, and prevent the nonprofit vendors from pressuring or defrauding potential buyers. These are laudable civic goals. But obvious, less restrictive means for achieving these same aims are readily available, and the majority simply chooses to ignore them.

To control congestion and visual blight, Honolulu can easily prohibit the nonprofits from setting up their stands in the most congested areas, such as areas near street intersections. Honolulu can also limit the size or number of stands that nonprofits may operate on each block, or restrict sales during certain times of the day, such as during the morning and afternoon rush hours. To protect the local merchant economy, Honolulu can require the nonprofits to display prominent signs on each stand, which is what some nonprofits already do.[2] Signs would clearly identify each organization as a nonprofit. This would make it obvious to tourists and other passersby that they are not dealing with the traditional souvenir shop. Finally, to prevent fraud and duress, Honolulu can employ traditional legal methods, such as prosecuting those who actually commit such crimes. *See Martin v. Struthers*, 319 U.S. 141, 148 (1943) (invalidating ordinance which prohibited the distribution of handbills to residences because city can punish those who harass or defraud occupants); *cf. Schneider v. State*, 308 U.S. 147, 162 (1939) (invalidating ordinance which prohibited passing out leaflets on city streets because obvious alternative methods such as punishing those who litter would effectively solve the littering problem).

In sum, a cursory glance at the available options reveals numerous less-restrictive alternatives to an outright ban on the sale of message-bearing T-shirts by nonprofits on Waikiki. Because Honolulu disregards obvious,

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[2] For example, One World One Family Now's T-shirt stands display a sign that reads "One World Family."

far less restrictive, and more precise methods of achieving the same ends, Honolulu's ordinance is not narrowly tailored. *See Discovery Network*, ___ U.S. ___, 113 S. Ct. at 1510 n.13; *Project 80's*, 942 F.2d at 638.

B

The majority also claims that plaintiff organizations remain free to spread their message through other media or in other places. Yet such alternative modes of communication may nevertheless be constitutionally inadequate if the speaker's "ability to communicate effectively is threatened." *Bay Area Peace Navy*, 914 F.2d at 1229 (citations omitted). The Supreme Court has given us guidance on this point in *City of Ladue v. Gilleo*, 114 S. Ct. 2038 (1994).

In *Ladue*, private property owners challenged an ordinance that prohibited display of any signs on their property other than "For Sale" or "For Rent." The Court struck down the ordinance because the City of Ladue foreclosed a "unique" and "important" medium of expression – the display of a sign on one's property to express a point of view. *Id.* at 2045. The Court rejected the city's argument that the regulation left open ample alternative channels of communication because it found that hand-held signs and other media were not an adequate substitute for posted signs:

> Residential signs are an unusually cheap and convenient form of communication. Especially for persons of modest means or limited mobility,

> a yard or window sign may have no practical substitute.

Id. at 2046.

Similarly, the T-shirt sales in this case constitute an effective and inexpensive medium of expression. When combined with oral proselytizing and literature distribution, selling message-bearing T-shirts is a particularly effective form of charitable solicitation. Indeed, a listener is more likely to expend funds to support a particular cause if he receives, in return, a T-shirt that communicates a message to him and that allows him to express *his* support for the cause by wearing it.

For the plaintiff organizations, Waikiki is a location uniquely suited to their mission. Waikiki is the social and economic center of not just the City of Honolulu, but also of the State of Hawaii. The nonprofits offered evidence that they selected Waikiki to sell their T-shirts because the area would allow them to share their philosophies with a large number of people who visit Hawaii from all over the world. Depriving plaintiffs of access to Waikiki separates them from a large and diverse audience.

The majority assumes the existence of other forums for plaintiffs' First Amendment activities. But we have held that an alternative is not adequate if the speaker is not permitted to reach the "intended audience." *Bay Area Peace Navy*, 914 F.2d at 1229. In *Bay Area Peace Navy*, we invalidated a Coast Guard regulation that prohibited protesters from demonstrating within a 75-yard radius of the pier during the annual "Fleet Week" celebration. We found that the 75-yard zone completely insulated the audience from the anti-war and anti-militarization views

of the demonstrators. 914 F.2d at 1230. *See also Ladue*, 114 S. Ct. at 2046 (alternatives to posting signs on residential property such as posting signs on commercial property are inadequate because residents may wish to reach neighbors); *Students Against Apartheid Coalition v. O'Neil*, 660 F. Supp. 333, 339-40 (W.D. Va. 1987) (university regulation prohibiting shanties on lawn of building where Board of Visitors meets, impermissibly insulates the Board, the intended audience, from the protest), *aff'd*, 838 F.2d 735 (4th Cir. 1988).

Here, the majority allows the City of Honolulu to exile plaintiff organizations from Waikiki. In so doing, it allows their removal from Waikiki's large and diverse audience and prevents them from spreading their message in an efficient and effective manner. Under *Bay Area Peace Navy*, Honolulu must afford plaintiffs an opportunity to reach their intended audience. This is especially true when, as discussed above in part A, there are reasonable alternative means to achieve legitimate government interests.

Accordingly, I dissent.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

ONE WORLD ONE FAMILY NOW, a Hawaii non-profit corporation; JAMES McDONOUGH, an individual; BHAKTIVEDANTA MISSION, LTD., a Hawaii non-profit corporation; and ANTON VOIGHT, an individual,	)	CIV. NO. 94-00395 HMF
Plaintiffs,	)	
vs.	)	
CITY AND COUNTY OF HONOLULU; FRANK F. FASI, individually and in his capacity as Mayor of the City and County of Honolulu; MICHAEL NAKAMURA, Chief of Police; DONNA WOO, individually and in her capacity as Special Deputy Attorney General of the State of Hawaii; JOHN DOES 1-10,	)	
Defendants.	)	

ORDER GRANTING IN PART PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION AND GRANTING PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER

INTRODUCTION

(Filed July 7, 1994)

Plaintiffs One World One Family Now, a Hawaii non-profit corporation ("One World"), James McDonough, One World's director, Bhaktivedanta Mission, Ltd.

("Bhaktivedanta"), a Hawaii non-profit corporation, and Anton Voight, Bhaktivedanta's director, move this court for a preliminary injunction. They seek to enjoin the City and County of Honolulu ("City"), Mayor Frank Fasi, and Chief of Police Michael Nakamura (collectively "defendants") from enforcing § 29-6.2(b)(7), Revised Ordinance of Honolulu ("peddling ordinance"), which prohibits plaintiffs from selling their message-bearing T-shirts on the streets of Waikiki. Plaintiffs also move this court for a temporary restraining order, to restrain defendants from enforcin9 the temporary ordinance passed by the City Council on June 15, 1994 as Bill No. 32 (1994), CD-1, FD-2, Ordinance 94-47 ("temporary ordinance" or "amended ordinance"). On June 2, 1994, the court granted plaintiffs, motion for a temporary restraining order enjoining the enforcement of the peddling ordinance until a hearing could be held on plaintiffs' motion for a preliminary injunction. Plaintiffs allege that the peddling ordinance and the temporary ordinance are unconstitutional and violate their First Amendment right to freedom of speech. A hearing on both motions was held on June 23 and 24, 1994. Having considered the motions, the evidence presented by both parties, and the supporting and opposing memoranda, the court GRANTS IN PART plaintiffs' motion for a preliminary injunction only to the limited extent detailed herein and GRANTS plaintiffs' motion for a temporary restraining order.

FINDINGS OF FACT

I. The Organizations' T-Shirt Sales

One World is a non-profit religious group which promotes an inclusive religious philosophy emphasizing

spiritual problems affecting the environment (spiritual ecology). Deposition of James McDonough at 12. As a relatively new organization, One World's primary objective is to raise people's consciousness as to the divisive nature of modern society. *Id.* at 89. In furtherance of this mission, One World sells T-shirts from portable tables in Waikiki, Hanauma Bay, and Halona lookout (the "Blowhole") that express the organization's purpose. *Id.* at 33, 50. The shirts contain messages such as "One World One Family Now, protect and preserve the truth, the beauty and harmony of our native cultures" and "clean and safe oceans for all, Hawaii." *Id.* at 59, 63. One World believes that T-shirts are a particularly effective way of conveying its message because the purchaser, in wearing the shirt, will disseminate the organization's message to anyone who sees the shirt. *Id.* at 32, 47, 50. The sales locations were chosen to maximize public exposure and to decrease visual blight. *Id.* at 34, 57-58. Coincidental with the sale, One World claims to discuss its philosophy with interested members of the public and distributes literature when asked for more information about the organization. *Id.* at 32, 48-49. The group's directors are also purportedly writing a book and working on a nationwide radio show to promulgate their views. *Id.* at 15. The sellers of One World's T-shirts, wear shirts which have the name One World imprinted on them. *Id.* at 59.

Bhaktivedanta is a non-profit organization whose mission seeks to propagate world-wide god consciousness by chanting the name of god, establishing places of worship, establishing programs to raise awareness of environmental concerns, and educating people on how to live life in harmony with god. Deposition of Anton

Voight at 10-11, 15-18, 32, 80, 82. In furtherance of this mission, Bhaktivedanta also sells T-shirts that express the organization's purpose. *Id.* at 56-60. The T-shirts contain expressions such as "harinam" (which means "chant the name of god"), and "meditate", and depict scenes which strive to glorify the beauty of god's creation. *Id.* at 56, 90, 93-97. To sell these T-shirts, Bhaktivedanta has set up portable tables on the sidewalks of Kalakaua Avenue in Waikiki, at Hanauma Bay, and at the Blowhole. *Id.* at 54. The Mission has chosen these locations to reach the broadest possible audience. *Id.* at 45. Coincidental with the sale of T-shirts, Bhaktivedanta also claims to discuss its philosophy with interested members of the public and distributes literature when asked for more information about the organization. *Id.* at 84-87.

The court also notes the following additional facts. One World and Bhaktivedanta are not the only organizations who sell T-shirts in Waikiki. Testimony of Officer Dunaway; Deposition of James McDonough at 54. Not all of the sidewalk T-shirt vendors in Waikiki sell message-bearing T-shirts or distribute literature. Testimony of Officer Dunaway. Plaintiffs have indicated their willingness to conform with table size and appearance specifications to reduce any aesthetically displeasing nature of their activity. Deposition of James McDonough at 35. Claiming to be non-profits, neither organization is currently paying state or federal taxes.

II. Waikiki

Waikiki is an rectangular area of approximately 500 acres within the City, bordered on two sides by the Ala

Wai Canal, on the third side by Kapiolani Park, and on the fourth side by the ocean. Waikiki is a prime tourist designation, with as many as 60,000 visitors a day, as well as a sizeable residential neighborhood. Testimony of Benjamin Lee. Due to this combination of residents and tourist traffic, Waikiki has a large concentration of vehicles and pedestrians which causes unique traffic problems. Testimony of Raymond Paul Won. Specifically, the City presented evidence that Kalakaua Avenue, the main thoroughfare in Waikiki, has a particularly heavy concentration of pedestrian traffic. *Id.*

Waikiki is also of historic and aesthetic significance for the island of Oahu. *See* Temporary Ordinance at 1-4; Testimony of Professor Preble. Waikiki has been the center of Hawaiian culture and social gatherings for Hawaiians for hundreds of years. *Id.* Until 1809, it was the seat of the government for the Kingdom of Hawaii, and even after the government was moved, Waikiki remained a favorite residential location for kings and queens. *Id.* In addition, Waikiki has a world-famous beach ideal for swimming and strolling. Since the second World War, Waikiki has developed into a prime resort location. Today, it is the heart of the state's tourist industry and the life blood of Hawaii's economy.

To maintain its historic and aesthetic ambiance of Waikiki, Waikiki was designated a special district in 1976. *Id.* The ordinance that creates the special district restricts hotel and apartment sizes and locations within the district, reduces height limitations in certain areas, requires landscaped open spaces, and promotes a pedestrian oriented environment. *Id.* The City has also implemented the Waikiki Beautification Project. Testimony of Benjamin

Lee. Although the project has many phases, the only phase that has been completed, to date, is the widening of the sidewalks along Kalakaua Avenue. *Id.*

According to the City, the peddling ordinance is an integral part of the Waikiki Beautification Project, intended to keep the streets free from potentially unattractive and harassing vendors. The peddling ordinance was also enacted to protect the local merchant economy from predatory competition from street vendors who do not pay rent and often do not pay taxes.

City officials testified that they believe that plaintiffs' (and other T-shirt vendors') activities have negatively impacted the overall ambiance of Waikiki. Testimony of Jeremy Harris. City officials testified that they have received complaints from local merchants that the street vendors were deleteriously affecting their businesses. *Id.*; testimony of Christina Kemmer. City officials also believe that the vendors' tables cause pedestrian traffic problems by decreasing the available sidewalk space for pedestrians. Testimony of Benjamin Lee. In order to counter these negative impacts, the City decided, in late spring of 1994, to start actively enforcing the peddling ordinance against sidewalk T-shirt vendors in Waikiki.

On May 23, 1994, the Honolulu Police Department received instructions from the Department of the Corporation Counsel of the City to cite anyone found in violation of the peddling ordinance – including the T-shirt vendors. *See* Aff'd of Jerrold Brown at ¶ 12. In addition, counsel for defendants stated at the hearing on plaintiffs' motion for temporary restraining order that anyone found violating the peddling ordinance would be cited.

On May 24, 1994, representatives of both One World and Bhaktivedanta Mission set up their tables to sell message-bearing T-shirts. *See* Declaration of Bao Nguyen (representative of One World); Declaration of David Santistevan (representative of Bhaktivedanta Mission). Representatives of both organizations were informed by Honolulu police officers that they were required to remove the tables and message-bearing T-shirts from the sidewalk adjoining Kalakaua Ave. *Id.* They were informed that if they did not remove all the message-bearing T-shirts, the police would seize the merchandise and the vendors would be cited for a violation of the peddling ordinance. *Id.*

III. The Ordinances

A. The Peddling Ordinance

The peddling ordinance provides, in pertinent part, as follows:

> Sec. 29-6.2. Regulations Affecting Peddlers
>
> * * *
>
> (b) Notwithstanding any ordinance to the contrary, it is unlawful for any person to sell or offer for sale, rent or offer for rent, goods, wares, merchandise, foodstuffs, refreshments or other kinds of property or services in the following area:
>
> * * *

> (7) Waikiki Peninsula upon the public streets, alleys, sidewalks, malls, parks, beaches, and other public places in Waikiki commencing at the entrance to the Ala Wai Canal, thence along the Ala Wai Canal to Kapahulu Avenue, thence along the diamond head property line of Kapahulu Avenue to the Ocean, thence along the ocean back to the entrance of the Ala Wai Canal; . . .
>
> The provisions of this subsection shall not apply to the sale or offer for sale of newspapers of general circulation and to duly authorized concessions in public places . . .
>
> (c) The provisions of subsection (b) of this section shall not be construed as prohibiting the sale or offer for sale on the public sidewalks of an approved parade route of buttons and souvenir items . . . for which a permit has been issued pursuant to Section 15-24.20. . . .

Section 29-6.2(b)(7), Revised Ordinance of Honolulu.

Violators of the peddling ordinance are subject to a fine not exceeding $1,000 or by imprisonment not exceeding one year or both. Section 29-6.4, Revised Ordinance of Honolulu.

Plaintiffs argue that the peddling ordinance unconstitutionally infringes on their free speech rights. Plaintiffs argue that the sale of message bearing T-shirts is fully protected speech, and that the peddling ordinance unreasonably restricts their rights to engage in this speech.

B. The Temporary Ordinance

The temporary ordinance was adopted on June 15, 1994. The ordinance is intended to be an interim measure to fill the gap created by the court's suspension of the peddling ordinance in its June 12, 1994 Order.

The temporary ordinance permits nonprofit organizations that first apply for and obtain a permit from the City Director of Finances ("director") to engage in charitable sales activity involving merchandise that is inexorably intertwined with the mission and message of the organization for the purpose of raising money for that organization. *See* Bill No. 32 (1994), CD-1, FD-2 (COR) at 10. The ordinance permits sales within the municipal parking lot located at Kuhio and Kaiolu Avenues, and on the diamond head side along the zoo fence on Monsarrat Avenue between Kalakaua Avenue and the side exit of Honolulu Zoo. An organization may maintain only one table at each location which will be limited to a maximum of no more than seven tables at each location. Sales may be conducted during daylight hours, but no earlier than 6:00 a.m. nor later than 6:00 p.m. *Id.*

The director is charged with the authority and responsibility of regulating the charitable sales activity. *Id.* at 13. Any rules adopted by the director must comply with Haw. Rev. Stat. Chapter 91, the Hawaii Administrative Procedure Act ("HI APA"). *Id.* The ordinance also permits the director to identify other locations within the Waikiki special district which he deems appropriate for charitable sales activity, provided that no such location shall be established on Kalakaua or Kuhio Avenues, and

provided further that any location selected shall be established more than 100 feet mauka of any mauka curb or makai of any makai curb of Kalakaua Avenue and more than 100 feet mauka of any mauka curb or makai of any makai curb of Kuhio Avenue. *Id.* at 10. The only other limitation on the director's designation of additional sales sites is that they may not substantially interfere with pedestrian traffic – i.e., when considered in conjunction with crowds which typically gather around such tables, an area of four foot in width must remain for pedestrian traffic. *Id.*

"Charitable sales activity" is defined as the solicitation of donations or contributions in exchange for, or the rental or sale of, any type of merchandise by nonprofit organizations for political, religious, philosophical or ideological purposes. *Id.* at 8. "Inexorably intertwined" is defined as merchandise that carries or conveys a political, religious, philosophical or ideological message that is permanent, readable or recognizable and that is informative of the purpose of the person conducting sales activity and meets all of the following criteria:

(1) The message carried or conveyed on the merchandise must be physically a part of the merchandise, indelible and not printed on a removable sticker;

(2) The message must be readable – printed in letters that can be read at a distance of eight feet with lettering no less than 3/16th of an inch high in the case of a black and white color scheme with no accompanying pictorial material and 1/2 an inch high in

all other circumstances – and not be camouflaged, innocuous, not contrasting, unreasonably small or placed in an unreadable place on the merchandise when the merchandise is used for its intended purpose;

(3) The mere placement of an organization's name on merchandise shall not qualify the merchandise as message-bearing unless the organization's name is informative of the purpose of the organization; and

(4) Expressions including but not limited to words such as "Hawaii" or "Honolulu" which are not intertwined with the person's message shall not qualify the merchandise as message-bearing.

Id. at 8-9.

Permits shall be issued monthly by the director to all nonprofit organizations which submit proper applications for such permits. *Id.* at 11. The permit application requires the following information:

(1) The name and address of the nonprofit organization seeking to conduct charitable sales activity;

(2) The names of individuals in charge of organizing charitable sales activity, and their address and telephone numbers where they may be reached during business hours;

(3) The names of individuals to be involved in selling;

(4) The type or types of merchandise involved in the applicant's sales and solicitations, but this shall not be construed to include

the message or the content of the message thereon;

(5) The purpose of the applicant and the purpose of the activity; and

(6) Submission of proof of nonprofit status.

Id. at 11-12. If the number of applications exceeds the number of spaces available, permits will be allocated on a lottery basis. *Id.* at 11.

The permittee is limited to one two-by-one foot sign that contains the organization's name. *Id.* at 12. A fact sheet must also be displayed on the table which must contain the organization's name and purpose, as well as a statement that the organization is not in any way associated with the City and that the monies are being solicited as part of the permittee's activities. *Id.*

The permit application contains six additional locations in which a nonprofit organization can conduct charitable sales: (1) Ala Wai Boulevard; (2) Ena Road; (3) Kalaimoku Street; (4) Royal Hawaiian Avenue; (5) Kaiulani Avenue (Ewa Side); (6) Kaiulani Avenue (Koko Head Side) (collectively "the additional sites"). These additional sites were established by the City on or about June 16, 1994. It is unclear how these sites were chosen, but it is undisputed that they are not contained in the text of the ordinance and that the City did not follow the procedures set forth in the HI APA when they were adopted.

Plaintiffs first argue that any additional sales locations not contained in the ordinance were adopted without following the proper procedures set forth in the temporary ordinance; therefore, the adoption of these

locations violate plaintiffs' due process rights, because the City adopted the additional sites without following the procedures set forth in Haw. Rev. Stat. Chapter 91. Plaintiffs also argue that the temporary ordinance is unconstitutional because (1) it is an invalid time, place and manner restriction in that it is both overly restrictive of protected First Amendment activity, and not content neutral; and (2) it leaves the director unfettered discretion to decide the (a) locations and amount of First Amendment activity, and (b) when to revoke or modify permits.

STANDARD OF REVIEW

In the Ninth Circuit, the standard for issuing a temporary restraining order is the same as the standard for preliminary injunctions: the court must apply a "sliding scale" analysis in balancing the plaintiff's likelihood of success on the merits with the hardships that would be caused to the plaintiff, the defendant, or the public if the injunction were granted or denied. *Alaska v. Native Village of Venetie*, 856 F.2d 1384, 1389 (9th Cir. 1988). Thus, to obtain a preliminary injunction, the plaintiff must show either (1) a combination of probable success on the merits and the possibility of irreparable injury, or (2) that serious questions on the merits are raised and the balance of hardships tips sharply in its favor. *Id.* (citations omitted). "Serious questions are 'substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation.' " *Senate of State of Calif. v. Mosbacher*, 968 F.2d 974, 977-78 (9th Cir. 1992) (*quoting Gilder v. PGA Tour Inc.*, 936 F.2d 417, 422 (9th Cir. 1991) (citations omitted)).

These formulations are not different tests but represent two points on a "single continuum," such that "[i]f the balance of harm tips decidedly toward the plaintiff, the plaintiff need not show as robust a likelihood of success on the merits as when the balance tips less decidedly." *Alaska v. Native Village of Venetie*, 856 F.2d at 1389 (citations omitted).

Finally, in cases involving the public interest, the court must also examine whether the public interest favors the plaintiff. *Fund for Animals v. Lujan*, 962 F.2d 1391, 1400 (9th Cir. 1992) (*citing Caribbean Marine Services Co. v. Baldridge*, 844 F.2d 668, 674 (9th Cir. 1988) and *Northern Alaska Environmental Center v. Hodel*, 803 F.2d 466, 471 (9th Cir. 1986)).

CONCLUSIONS OF LAW

I. Likelihood of Success on the Merits

A. Standing

As a threshold issue, defendants argue that plaintiffs have no standing to bring the present action for injunctive relief because plaintiffs have not yet been cited or prosecuted. Accordingly, the court should decline to consider the case until the facts are more fully developed.

The Supreme Court has held that a case presents an actual and ripe controversy where there is a "reasonable threat of prosecution for conduct allegedly protected by the Constitution." *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 626 n.1 (1986); *Steffel v. Thompson*, 415 U.S. 452, 45859 (1974); *Polykoff v. Collins* 816 F.2d 1326, 1331 (9th Cir. 1987). In the instant case,

Major Brown's Affidavit and counsel's statements at the temporary restraining order hearing indicate that plaintiffs will be cited and potentially prosecuted if they continue to sell their T-shirts in Waikiki – an activity they allege is protected by the Constitution. Since plaintiffs have demonstrated a threat of prosecution, the constitutional issues are ripe for adjudication.

B. Peddling Ordinance

The Ninth Circuit Court of Appeals has held that the sale by a non-profit group of merchandise which carries or constitutes a political, religious, philosophical, or ideological message, and which is inextricably intertwined with the organization's expressive activities, is fully protected speech. *Gaudiya Vaishnava Society v. San Francisco*, 952 F.2d 1059, 1066 (9th Cir. 1990), *cert. denied*, 112 S. Ct. 1951 (1992).

When an ordinance seeks to constrain protected First Amendment activity in a public forum, the government's authority to impose restrictions is at its minimum. *Id.*; *see also United States v. Grace*, 461 U.S. 171, 177; *Schneider v. State*, 308 U.S. 147, 159-162 (1939). Sidewalks, streets, and parks are traditional public fora. *Grace*, 461 U.S. at 177 (citations omitted). In a public forum, the government may only enforce reasonable time, place and manner regulations as long as the restrictions are content neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (*citing Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 193 (1984)); *Grace*, 461 U.S. at 177;

Gaudiya, 952 F.2d at 1065 (*citing Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)). In order to be narrowly tailored, the speech restriction formulated by the government need not be the least restrictive alternative; rather, the requirement of narrow tailoring is satisfied so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation. *Ward*, 491 U.S at 798-99. However, the Supreme Court has held that a total ban on use of the sidewalks for speech is unreasonable and that an absolute prohibition on a particular type of expression will be upheld only if narrowly drawn to accomplish a compelling government interest. *Grace*, 461 U.S. at 177, 181 (citations omitted); *see also City of Ladue v. Margaret P. Gilleo*, 62 LW 4477 (June 13, 1994) (*citing Lovell v. Griffin*, 303 U.S. 44, 451-452 (1982); *Jamison v. Texas*, 318 U. S. 413, 416 (1943); *Martin v. Struthers*, 319 U.S. 141, 145-49 (1943); *Schneider*, 308 U.S. at 164-65; *Schad v. Mount Ephraim*, 452 U.S. 61, 75-76 (1981)).

The parties hotly contest the application of these principles of law to the peddling ordinance and to the facts of the instant dispute.

Plaintiffs argue that their sale of message-bearing T-shirts is fully protected speech under the Ninth Circuit's decision in *Gaudiya*. By completely banning this fully protected speech in all of Waikiki, plaintiffs argue that the peddling ordinance, as applied,[1] is an unreasonable time, place and manner restriction. In addition,

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[1] Plaintiffs seem to be attacking the statute both as constitutionally infirm on its face and as unconstitutional as applied to plaintiffs' specific activities. Since, on its face, the peddling ordinance does not vest discretion to regulate speech

plaintiffs argue that the government interests proffered in support of the peddling ordinance are not significant, and, even if they were significant, the ordinance is not narrowly tailored to serve these interests.

The City begins by arguing that *Gaudiya* is not applicable to the present case because (1) plaintiffs' activities do not fall within the *Gaudiya* court's definition of protected activity – the merchandise sold by plaintiffs does not carry or constitute political, religious, philosophical, or ideological message, and the sales are not inextricably intertwined with the organization's expressive activities, and (2) the peddling ordinance differs from the statute at issue in *Gaudiya* because the peddling ordinance does not allow any discretion. Hence, the peddling ordinance should be examined under the test articulated by the Supreme Court in *United States v. O'Brien*, 391 U. S. 367 (1968), which applies to content-neutral regulations of conduct that have an incidental effect on speech. In the alternative, defendants argue that even if plaintiffs' activity is speech, the peddling ordinance is a valid, content neutral time, place, and manner regulation of speech in a public forum and thus satisfies the test set forth in *Ward*. Specifically, the government argues that the peddling ordinance serves four substantial government interests: (1) to preserve the aesthetic attractiveness of Waikiki against the visual blight created from displays of merchandise; (2) to protect public safety by helping to ensure

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in/with any City official, the court will construe plaintiffs' unspecified claims as an as-applied challenge. *See, e.g., Ward*, 491 U.S. at 793; *Members of the City Counsel of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 796-803 (1984).

the uncontested and orderly movement of traffic on pedestrian sidewalks; (3) to prevent fraud; and (4) to preserve the local merchant economy. According to the defendants, the peddling ordinance is narrowly tailored because it only restricts plaintiffs' activities in Waikiki; it allows plaintiffs to sell their T-shirts throughout the remainder of the City.

1. Inexorably Intertwined

The *Gaudiya* court did not specifically define the expression "inexorably intertwined." Rather, the court held that the sale of merchandise which contained a political, religious, philosophical, or ideological message by the *Gaudiya* plaintiffs, when done in conjunction "with other activities in order to disseminate their organizations' message" – such as, "distributing literature, engaging in persuasive speech, and selling messages affixed to the product" – was fully protected speech. *Gaudiya*, 952 F.2d at 1064.

The court has examined the T-shirts submitted by the plaintiffs in conjunction with Voight's and McDonough's deposition.[2] On the basis of this language in *Gaudiya*, the court finds that plaintiffs' sale of these message-bearing T- shirts is fully protected speech under the Ninth Circuit's decision in *Gaudiya*. The messages on the T-shirts submitted to the court carry or constitute political, religious, philosophical, or ideological messages, and, since done in conjunction with other expressive activities, are

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[2] See Exhibits 3-6, 10-11 to the Deposition of Anton Voight, and Exhibits 3-8, 10-11 to the Deposition of James McDonough.

inextricably intertwined with the organization's expressive activities. *Gaudiya*, 952 F.2d at 1066. Bhaktivedanta's T-shirts, which bear messages such as "harinam" and "meditate," contain a religious message, and, when sold in conjunction with the distribution of informative literature are inexorably intertwined with Bhaktivedanta's goals (propagating world-wide god consciousness by chanting the name of god, establishing places of worship, establishing programs to raise awareness of environmental concerns, and educating people on how to live life in harmony with god). Similarly, One World's T-shirts, which bear slogans promoting preservation of the environment, convey a religious or political message. When sold in conjunction with the distribution of literature, these shirts are inexorably intertwined with One World's mission to promote harmony and spiritual ecology.

The City argues that plaintiffs' activities are not inexorably intertwined with their expressive activities because not all the tables that sell T-shirts in Waikiki distribute literature. However, the general testimony that not all vendors in Waikiki are engaging in expressive activity does not contradict plaintiffs' specific testimony that all of their vending tables distribute literature. The court is *not* ruling on whether other vendors in Waikiki not associated with plaintiffs' organizations are selling message-bearing merchandise that is inextricably intertwined with other expressive activities.

The City also argues that plaintiffs' sale of message-bearing T-shirts is not inexorably intertwined with the organizations' expressive activities because plaintiffs' sales do not conform with the use of that expression in the Supreme Court's decision in *Board of Trustees of the*

State University of New York v. Fox, 492 U.S. 469, 474-74 (1989). The City argues that this court should look to *Fox* for the definition of inexorably intertwined, because "*Gaudiya* instructs that the test for whether pure speech and commercial speech are "inexorably intertwined" is set forth in . . . *Fox* . . . , *cited in Gaudiya*, 952 F.2d at 1064 n.5."

Footnote five of the *Gaudiya* decision states:

> The City also contends that the only political, religious, philosophical or ideological message conveyed during the sales of merchandise by nonprofits is small, innocuous, camouflaged or a removable message on the merchandise itself. *We do not address the case of sales of merchandise not inexorably intertwined with First Amendment speech. That situation,* which was not presented by the facts of this case, *would presumably fall under the rule of Board of Trustees of the States University of New York v. Fox*, 492 U.S. 469 (1989). If the speech element was purely commercial, a political or religious message not intertwined with that commercial message would be insufficient to transform the whole into pure speech.
>
> This facial systemic challenge does not require us to determine at what point the commercial element of a sale of any type of merchandise would so overwhelm the noncommercial element with which it is intertwined.

Gaudiya, 952 F.2d at 1064 n.5 (emphasis added). This footnote does not direct courts to look at *Fox* to define the phrase "inexorably intertwined." Rather, it states that if a sale of merchandise is *not* inexorably intertwined with First Amendment speech, that sale falls under the rule in

Fox. Because the court has already found the sale at issue here to be inexorably intertwined with First Amendment speech, the City's argument on this point is unpersuasive.

2. Time, Place, and Manner Restrictions

The peddling ordinance prohibits plaintiffs, throughout all Waikiki, from exercising their First Amendment right to sell message bearing T-shirts. Accordingly, the peddling ordinance is constitutional only if it is a valid time, place and manner restriction of plaintiffs' First Amendment rights. *Grace*, 461 U.S. at 177. It is a reasonable time, place and manner regulation so long as it is content neutral, narrowly tailored to serve a significant government interest, and leaves open ample alternative channels of communication. *Ward*, 491 U.S. at 791 (*citations omitted*). The City is entitled to impose reasonable regulations upon the vendors, the question presented to the court is whether the peddling ordinance, as-applied to these plaintiffs, is a reasonable restriction of their First Amendment activities.

Plaintiffs contend that the peddling ordinance is not content neutral because it contains exceptions for sale of buttons during a parade and the sale of newspapers of general circulation.[3] However, these two exceptions to the peddling ordinance do not in any way allow the City

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[3] Contrary to defendants' contention, plaintiffs did not raise this argument for the first time at the hearing on the motion for preliminary injunction. *See* Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction at 14. Accordingly, the court will consider plaintiffs' argument.

to regulate the content of an individual's speech. There is no indication that the messages conveyed on plaintiffs' shirts would be either banned or allowed if conveyed through newspapers or buttons, or that the City allows buttons and newspapers to contain messages which T-shirts are prohibited from displaying. In addition, since the exceptions to the peddling ordinance are very limited, they do not implicate the concern expressed by the Supreme Court in *City of Ladue*, 62 LW 4477, 4480, that an underinclusive regulation may in effect not be content neutral.

Defendants argue that the court should analyze the peddling ordinance under *O'Brien*, 391 U.S. 367, as a law of general applicability regulating conduct that may have an incidental effect on speech. In light of *Gaudiya*, this argument is similarly unpersuasive. In *Gaudiya*, the Court of Appeals for the Ninth Circuit specifically criticized the application of *O'Brien* to the sale of message-bearing goods by non-profit organizations. The appellate court therein reasoned that such sales reflect the tension between commercial and noncommercial speech, rather than that between protected speech and non-protected conduct. *Gaudiya*, 952 F.2d at 1065. Thus this court is not at liberty, absent a showing by the defendant that *Gaudiya* is either distinguishable or no longer the law, to apply *O'Brien* to the facts of this case.

The City argues that the instant case is distinguishable for the following reason: according to the City, the San Francisco law addressed by the *Gaudiya* court was struck down because it allowed a City official unfettered discretion in granting permits to individuals seeking to exercise their fully protected First Amendment rights.

Since the peddling ordinance is a non-discretionary regulation of conduct – peddling – defendants argue that *O'Brien*, and not *Gaudiya*, is applicable to the instant case. The court is bound to follow Ninth Circuit precedent, including the *Gaudiya* decision, and both the language and structure of the *Gaudiya* decision belie the City's argument.

The *Gaudiya* court's rejection of *O'Brien* can be found in the portion of the decision which concludes that the sale of message-bearing T-shirts by non-profits is fully protected speech; *O'Brien* is **not even mentioned** in the *Gaudiya* court's discussion on discretion. *Gaudiya*, 952 F.2d at 1065. The court would, therefore, have to ignore the plain language of this opinion in order to conclude, as defendants suggest, that *Gaudiya* rejected *O'Brien* on the basis of discretion. It is for the Ninth Circuit, and not this district court, to limit the language of *Gaudiya*.

Furthermore, the *Gaudiya* court explicitly declined to apply *O'Brien* for two reasons. First, the appellate court did not apply *O'Brien* because it found that the activity at issue – the sale of message-bearing T-shirts – reflected the conflict between commercial and non-commercial speech, rather than the conflict between speech and conduct. Because *O'Brien* concerned the latter, it was inapplicable to cases involving the former. Second, the Ninth Circuit held that even if the court were to apply the *O'Brien* test, the San Francisco ordinance would fail *O'Brien* on the facts: the San Francisco statute was not content neutral because it gave the chief of police too much discretion, and was therefore unconstitutional. In short, the Ninth Circuit held that *O'Brien* could not save the statute in *Gaudiya* for two independent and distinct reasons: (1)

O'Brien was inapplicable to the sale of message bearing T-shirts; and (2) the statute failed *O'Brien* standards because it gave the chief of police unfettered discretion. If the *Gaudiya* court had wanted to reject *O'Brien* based solely on the San Francisco ordinance grant of discretion, it would not have articulated and extensively analyzed the speech/conduct rationale for rejecting *O'Brien*. Given that the Ninth Circuit discussed both, and that the speech/conduct rationale rejecting *O'Brien* precedes the discretion paragraph in the text of the opinion, the language of *Gaudiya* prevents this court from applying the *O'Brien* test to the facts of the present case. Again, it is for the Ninth Circuit, and not this court, to limit the holding of the *Gaudiya* decision.

Turning to the facts of this case, the court finds that the City has articulated and presented evidence to support three significant interests. First, the City presented ample evidence to show it has a significant interest in maintaining the aesthetic attractiveness of Waikiki. *See Metromedia, Inc. v. San Diego*, 553 U.S. 490, 507-508, 510 (plurality opinion). Second, the City has a significant interest in promoting public safety and the orderly movement of pedestrians. *Heffron*, 452 U.S. at 649-51. Finally, the City has shown that it has an interest in protecting the local merchant economy. However, the City has not presented any credible evidence to support the claim that the T-shirt vendors are causing a proliferation of fraud and duress among tourists and residents.

Nonetheless, the court finds that the peddling ordinance is not a reasonable time, place, and manner restriction of plaintiffs' protected First Amendment activities. Although content neutral, the peddling ordinance is not

narrowly tailored to achieve either of these significant government interests and does not leave open ample, alternative channels for communication.

The peddling ordinance effectuates a total ban on the sale of plaintiffs' message-bearing T-shirts throughout all of Waikiki. The City has not presented evidence to support such a total ban for all of Waikiki. The City has, however, presented persuasive evidence to support the proposition that allowing T-shirt vendors on Kalakaua and Kuhio Avenues would have a negative impact on the aesthetics of Waikiki and pedestrian safety on these two thoroughfares, as well as a deleterious effect on the merchants on these streets. However, the City has not offered any evidence to show how any of these three significant interests are advanced by completely banning T-shirt sales throughout the remainder of Waikiki. Since the City has not presented any evidence as to how the peddling ordinance advances a significant government interest other than with respect to the beauty and safety of Kalakaua and Kuhio Avenues, the court cannot find the ordinance narrowly tailored.

Defendants argue that any total ban in Waikiki is permissible because Waikiki is only a small portion of the City. They cite *Clark* in support of this proposition. Defendants argue that *Clark* held that the First Amendment does not guarantee a speaker the audience of their choice. Such reliance, however, is misplaced due to the factual disparity between this case and *Clark*.

First, the ban on the mall analyzed by the Supreme Court in *Clark* was not absolute. Rather, the ban was only on camping in the park at night. Accordingly, the *Clark*

plaintiffs were free to engage in their chosen expressive activity during the day time; they were simply prohibited from doing so at night. *Clark* was, therefore, a reasonable time restriction on one type of First Amendment activity in one area of Washington, D.C. It was not a total ban on one type of First Amendment activity.

Similarly, the *Ward* plaintiffs were not prevented from engaging in their chosen mode of expression. *Ward*, 491 U.S. 781. Rather, the City of New York merely imposed volume restrictions on that activity to promote the significant government interests of controlling noise and avoiding intrusion into residential areas. Here, in contrast, plaintiffs are prohibited from *ever* selling their message-bearing T-shirts in any location and at any time in Waikiki. Because it is an absolute ban on First Amendment activity, it is not a reasonable regulation of time, place, or manner.

Second, courts in this circuit have held that a total ban on selling expressive T-shirts in a heavily trafficked section of town is impermissible, even if the remainder of the town is unaffected by the ban. In *Gaudiya*, the ban applied only to the Fisherman's Wharf and Union Square areas, and not to all of the city of San Francisco. *Gaudiya*, 952 F.2d at 1061. Similarly, in *International Society for Krishna Consciousness vs. San Diego Unified*, Case No. 91-1768-B (S.D.Cal. 1992), Judge Brewster struck down an ordinance which prohibited the sale of message-bearing merchandise within the port authority district, a small area of the City of San Diego.

Finally, defendants' analogy between the Mall in Washington D.C. and Waikiki is unpersuasive in light of

the City's own witnesses' testimony. The City's witnesses have testified that Waikiki is a fully distinct district with as many as 60,000 tourists during the height of the tourist season; no other part of Honolulu offers even a fraction of that number of tourists concentration or exposure.

While the City argues that Waikiki is simply a small part of Honolulu, for all practical purposes it functions as a distinct entity – it has its preservation society and neighborhood organization; it receives funding for projects that are unique to Waikiki. Indeed, all these factors are what make it a "special district."

Defendants also rely on cases that analyze permissible restrictions in limited public fora to support the City's total ban in Waikiki. *See* Temporary Ordinance at 4 (*citing United States v. Albertini*, 472 U.S. 675 (1985) (restricting speech on a military base – a military base is generally not a public forum); *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640 (1981) (fairground is a limited public forum); *United States v. Kokinda*, 497 U.S. 720 (1990 (post office property was a limited public forum); *International Society for Krishna Consciousness v. Lee*, 122 S.Ct. 2701 (1992) (airport is not a public forum)). Such reliance is unwarranted because, in the instant case, the court is dealing with the quintessential public forum – the public sidewalks.

Plaintiffs argue that a total ban on Kalakaua Avenue is an impermissible restriction of their First Amendment activities. *Ward*, 491 U.S. at 791. The court, however, finds that defendants' evidence supports the imposition of a total ban on Kalakaua Avenue. Such a ban, however, is permissible only as long as there are ample alternative

channels left open for communication. While a total ban on sidewalks in Waikiki is not narrowly tailored given the size of the area and the totality of the ban, the First Amendment does *not* guarantee a speaker access to any particular Waikiki sidewalk. The City has justified its ban on all Kalakaua peddlers – including charitable sales – by articulating significant government interests supporting the ban and by allowing access to alternate channels of communication. With respect to Kalakaua and Kuhio Avenues, the City has presented sufficient evidence demonstrating that plaintiffs' T-shirt sales would have a deleterious effect on pedestrian safety and aesthetics. The court is especially persuaded that the tax-free and rent-free activities of the plaintiffs, albeit a constitutionally protected expression of free speech, have had a significant affect on the economy of the abutting shop owners on Kalakaua and Kuhio Avenues whose taxes and rent contribute to the welfare and economy of this state.

In conclusion, the court finds that the peddling ordinance, as-applied to plaintiffs' expressive activities, is not a reasonable time, place and manner regulation because it is not narrowly tailored. The evidence does not support a total ban on charitable sales activity on all Waikiki sidewalks because the City has not shown how its four significant interests are advanced by a total ban of all expressive T-shirt sales in Waikiki. However, the City has shown that a ban of charitable sales on Kalakaua and Kuhio Avenues is necessary for pedestrian safety, the maintenance of the aesthetic character of Waikiki, and the protection of the local merchants on Kalakaua and Kuhio Avenues. Therefore, the peddling ordinance is enjoined only in so far as it applies to the sale of message bearing

T-shirts, as defined by *Gaudiya* and this order, on streets in Waikiki other than Kalakaua and Kuhio Avenues.

This order does not prevent the City from enforcing the provisions of the peddling ordinance that fall outside the scope of this injunction – i.e., non-expressive activity throughout all of Waikiki. This order does not sanction the activities of any other vendors unless their activities and products fall within the purview of this court's definition of permissible expressive activities.

C. Temporary Ordinance

Plaintiffs attack the temporary ordinance on its face, arguing that it confers upon the director unfettered discretion to choose additional sites and to grant permits.

The court had hoped that the City would amend the existing ordinance and pass a temporary ordinance free of constitutional infirmity. It did not.

The temporary ordinance has a number of constitutional deficiencies. First, the six additional sites named on the permit application were designated in violation of the City's own temporary ordinance which required compliance with the HI APA. Second, it violates the First Amendment because it (1) is overly restrictive, (2) is not content neutral, and (3) confers upon the director impermissible discretion. However, the end result envisioned by the City – restricting the sale of message-bearing T-shirts to eight locations in Waikiki, as well as limiting the hour of sales and the number and size of tables – would probably survive the *Ward* time, place and manner test. The court will consider each problem in turn.

1. Due Process Claims

The temporary ordinance allows, but does not require, the director to identify other locations within the Waikiki special district which are deemed appropriate for charitable sales activity. Temporary Ordinance at 10. The ordinance fails to identify the locations of the alternate sites, but states that in adopting any rules the director must comply with Haw. Rev. Stat. Chapter 91, the HI APA.

The HI APA defines a rule as an "agency statement of general or particular applicability and future effect that implements, interprets, or prescribes law or policy, or describes the organization, procedure or practice requirements of the agency." Haw. Rev. Stat. § 91-1(4). When adopting a rule, the HI APA requires that the following procedures are followed:

> § 91-3. Procedure for adoption, amendment or repeal of rules.
>
> (a) Prior to the adoption of any rule authorized by law, or the amendment or repeal thereof, the adopting agency shall:
>
> (1) Give at least thirty days notice for a public hearing. The notice shall include:
>
> (A) Either:
>
> (i) a statement of the substance of the proposed rule adoption, amendment, or repeal; or
>
> (ii) a general description of the subjects involved and the purposes to be achieved by the proposed rule adoption, amendment, or repeal; and

> (B) a statement that a copy of the proposed rule to be adopted, the proposed rule amendment, or the rule proposed to be replaced will be mailed at no cost to any interested person who requests a copy, together with a description of where and how the requests may be made; and
>
> (C) the date, time and place where the public hearing will be held and where the interested persons may be heard on the proposed rule adoption, amendment, or repeal.

Haw. Rev. Stat. § 91-3.

If a rule is adopted without following the proper procedures, the rule is invalid and unenforceable. Haw. Rev. Stat. § 91-7(B); *Ainoa v. Unemployment Compensation Appeals Division*, 62 Haw. 286, 293 (1980); *Burk v. Sunn*, 68 Haw. 80, 83 (1985), *recon. denied*, 68 Haw. 687.

The temporary ordinance explicitly requires City officials to comply with HI APA procedures before taking additional actions based on the ordinance. Unlike the parking lot and the zoo fence, the six additional sites are not listed in the ordinance, and thus, the temporary ordinance requires that their adoption must comply with the HI APA. As the City failed to comply with Haw. Rev. Stat. § 91-3, these additional locations are presently a nullity.

The City argues that the additional locations are not rules because the temporary ordinance provides the director guidance in choosing those locations. Specifically, the temporary ordinance requires that additional

locations not be established on Kalakaua or Kuhio Avenues, and requires that any location selected shall be established more than 100 feet mauka of any mauka curb or makai of any makai curb of Kalakaua Avenue and more than 100 feet mauka of any mauka curb or makai of any makai curb of Kuhio Avenue. Also, additional sales sites may not substantially interfere with pedestrian traffic.

While these statements identify two locations where the sales cannot take place, there are no clear directives as to where, specifically, the sales can take place. Additional locations are left to the choice of the director. In exercising such a choice, the amended ordinance specifically requires the director to follow the HI APA. In the cases cited by the City, all from other jurisdictions, the action to be taken by the administrative agency was specifically defined. *See* Defendants' Memorandum in Opposition to Plaintiffs' Motion for a Temporary Restraining Order filed June 21, 1994 at 8-9 (*citing St. Francis Hosp. v. Dept. of Health and Rehabilitative Services,* 533 So.2d 1351 (Fla.App. 1989); *Total Petroleum, Inc. v. Dept. of Treasury,* 427 N.W.2d 639 (Mich. App. 1988); *Amerada Hess Corp. v. Conrad,* 410 N.W.2d 124 (N.D. 1987); *Doherty v. Oregon Water Resources Director,* 758 P.2d 865 (Or.App. 1988); *Equitable Life Mortg. and Realty Investors v. New Jersey Div. of Taxation,* 376 A.2d 966 (N.J.Super 1977)). In the instant case, there are simply too many locational options available for the court to find that additional locations were specifically defined.

However, the failure to follow the procedures set forth in the HI APA does not, as plaintiffs contend, invalidate the entire temporary ordinance. Rather, it only invalidates the improperly adopted rules. *Ainoa,* 62 Haw.

at 293. As a result, the only locations currently available for charitable sales activity are those listed in the temporary ordinance – (1) the parking lot at Kaiolu Street and Kuhio Avenue; (2) the side exit of Honolulu Zoo, the latter being outside the Waikiki special district. Accordingly, the First Amendment analysis must proceed considering only the availability of these two sites.

2. First Amendment Claims

a. Narrowly Tailored

As the court already stated above, a total ban on expressive T-shirt sales in Waikiki is not narrowly tailored. In the temporary ordinance, vendors are also allowed to sell in one area within Waikiki: the parking lot at the corner of Kaiolu Street and Kuhio Avenue. The temporary ordinance also grants access to space along the zoo fence, an area outside the Waikiki special district. Even considering both these locations, the temporary ordinance constitutes an almost total ban of the use of sidewalks in Waikiki. Such a total ban is constitutionally impermissible for the reasons detailed above.

b. Content Neutral

The temporary ordinance attempts to regulate the content of a non-profit group's expression, and is therefore unconstitutional. The content neutral rule prevents a government entity from limiting speech based on the substance of what a speaker is saying. *See e.g. Ward,* 491 U.S. at 791-793; *N.A.A.C.P., Western Region v. City of Richmond,* 743 F.2d 1346, 1357 (9th Cir. 1984). In the present

case, the City has specifically regulated the content of plaintiffs' expression by attempting to define the term "inexorably intertwined" based on the use of particular words. For example, the City is regulating content by declaring that a non-profit group may not use the words Honolulu or Hawaii in the message on its T-shirt. In imposing this restriction, the City has assumed that "Honolulu" and "Hawaii" are words that cannot be inexorably intertwined with an organization's message.[4] The City has articulated, and the court can find, no basis for this assumption; under First Amendment law, City officials cannot tell an organization that these terms cannot be part of its message. Indeed, these words may be an essential part of a group's message if that group's concern is specifically limited to Hawaii – for example, preserving the unique Hawaiian ecology. It is not for the City to define for a non-profit group what its message should be.

The City argues that, by enjoining the peddling ordinance and the temporary ordinance, this court puts the City in an untenable position – without the ordinances' control there will be a proliferation of unchecked peddling in Waikiki leading the streets of Waikiki to resemble a swap meet. This argument is without merit for two reasons. First, the court is only enjoining the peddling ordinance to the limited extent set forth above.

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[4] The City cannot define the content of a message, though the City might impose the requirement that the message be apparent on the face of the article – note, such a requirement does not regulate *content*.

Second, the City can control non-expressive peddling via prosecution and not via a permit system or an ordinance. The City must allow the sale of message-bearing T-shirts when those sales are inexorably intertwined with other expressive activities, as that language is defined by the Ninth Circuit, on at least some streets in Waikiki during at least some hours of the day. However, the City is free to prosecute those groups who sell garments with messages that are purely commercial, and thus not intertwined with the organizations' purpose. The defense to such a prosecution would be that the message was indeed inexorably intertwined. A court would then determine whether the T-shirts' message was sufficiently tied to the organizations purpose as to fit within *Gaudiya*. As the temporary ordinance now reads, however, the City can dictate to the non-profit groups what they can and cannot say. Such content-based restriction is impermissible under the First Amendment.[5]

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[5] Closely related to the above discussion is plaintiffs' argument that the temporary ordinance is unconstitutional because it targets a particular mode of expression. The Supreme Court has voiced concern about laws that foreclose or restrict an entire medium of expression. *See e.g. City of Ladue v. Gilleo*, 62 U.S.L.W. 4477 (June 13, 1994) (ban on the use of signs conveying an expressive message on most, but not all property, is impermissible); *Lovell v. Griffen*, 303 U.S. 444 (1938) (banning the distribution of pamphlets is impermissible); *Jamison v. Texas*, 318 U.S. 413 (1948) (banning hand-billing on public streets impermissible); *Martin v. Struthers*, 319 U.S. 141 (1948) (banning door to door distribution of literature impermissible); *Schad v. Mount Ephram*, 452 U.S. 61 (1981) (banning live entertainment impermissible). The Supreme Court has held that by limiting an entire manner of speaking, such measures can suppress too much speech. *City of Ladue*, 62 U.S.L.W. at 4481. Under this

c. Discretion

Finally, the ordinance leaves too much discretion in the hands of the director. The ordinance confers on the director two important tasks: (1) he has discretion to choose additional sites available for charitable sale[6]; and (2) he has the opportunity to grant or deny permits.

The director has the authority to choose additional sites if he feels they are necessary and only when they do not substantially impede pedestrian traffic. Such language allows the director the discretion to allow the non-profits to sell almost anywhere, or conversely, to confine them to one or two back alleys. Such discretion is constitutionally impermissible. *Gaudiya*, 952 F.2d at 1065.

The temporary ordinance also fails to specifically define the mechanism for granting or denying permits. While the temporary ordinance does require a non-profit group to include certain information on its permit application, the temporary ordinance does not contain "narrow, objective, and definitive standards to guide the

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theory, the temporary ordinance may also be problematic because it restricts one particular mode of expression and not others. Such a finding would depend on the importance of this mode of expression to the individual or organization speaking. *See City of Ladue*, 62 U.S.L.W. at 4481.

[6] At the preliminary injunction hearing, counsel for the City stated that the City fully intended to designate additional sites for charitable sales activity pursuant to the temporary ordinance. While the court commends and encourages the City's efforts, counsel was unable to adequately explain how the word "may" used in the temporary ordinance in fact meant "shall."

licensing authority" in granting or denying a permit." *See Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 1505-51 (1969); *see also City of Lakewood*, 486 U.S. at 769-772. The ordinance merely says that the permit will be awarded to a "proper" application on a "nondiscretionary basis." Amended Ordinance at 12. The amended ordinance does not define how the director will grant permits in such a nondiscretionary manner, nor what constitutes a proper application. Failure to provide such guidelines allows the director discretion to deny permits, if, for example, he finds the application improper because he does not believe that the information provided by a group complies with his definition of "inexorably intertwined." This discretion is especially problematic in light of the City's express purpose, stated on the face of the statute, to pursue a total ban on all non-profit charitable sales. Additionally, the permits must be renewed monthly, and the Supreme Court has articulated that clear guidelines are particularly important when a permit must be frequently renewed. *See City of Lakewood*, 486 U.S. at 759.

Accordingly, the temporary ordinance as presently written fails a constitutional challenge because it is not narrowly tailored, it is not content neutral, and it allows the director unfettered discretion to choose additional sales sites and to grant or deny permits.

II. Irreparable Harm

The Ninth Circuit has held that when an alleged deprivation of a constitutional right is involved, no further showing of irreparable injury is necessary. *Guiterrez v. Municipal Court of the South East Judicial District*, 838

F.2d 1031, 1045 (9th Cir. 1988) (citing *Mitchell v. Cuomo*, 748 F.2d 804, 806 (2d Cir. 1984)). Accordingly, plaintiffs have satisfied the irreparable injury requirement for a preliminary injunction and a temporary retraining order.

CONCLUSION

In summary, the court GRANTS plaintiffs' motion for a preliminary injunction of the peddling ordinance. The court enjoins application of the peddling ordinance only in so far as it is applied to these plaintiffs' protected First Amendment activities, as defined herein, in Waikiki except Kalakaua and Kuhio Avenues. The peddling ordinance remains viable and may be applied to any other peddling activity throughout all of Waikiki. The court also GRANTS plaintiffs' motion for a temporary restraining order of the temporary ordinance in full.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, JUL 7 1994

/s/ Harold M. Fong
UNITED STATES DISTRICT JUDGE

ONE WORLD ONE FAMILY NOW ET AL. VS. CITY AND COUNTY OF HONOLULU ET AL.; CIV. NO. 94-00395 HMF; ORDER GRANTING IN PART PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND GRANTING PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER

Not For Publication

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ONE WORLD ONE FAMILY NOW, A Hawaii non-profit corporation; JAMES MCDONOUGH; BHAKTIVEDANTA MISSION, LTD., a Hawaii non-profit corporation; ANTON VOIGHT, Plaintiffs-Appellants, v. CITY AND COUNTY OF HONOLULU; FRANK F. FASI, individually and in his capacity as Mayor of the City and County of Honolulu; MICHAEL NAKAMURA, Chief of Police; DONNA WOO, individually and in her capacity as Special Deputy Attorney General of the State of Hawaii; and JOHN DOES 1-10, Defendants-Appellees.	No. 94-16373 D.C. No. CV-94-00395-HMF
ONE WORLD ONE FAMILY NOW; JAMES MCDONOUGH, an individual; BHAKTIVEDANTA MISSION, LTD., a Hawaii non-profit corporation; ANTON VOIGHT, Plaintiffs-Appellees,	

v.	*	No. 94-16511
CITY AND COUNTY OF HONOLULU; FRANK F. FASI, individually and in his capacity as Mayor of the City and County of Honolulu; MICHAEL NAKAMURA, Chief of Police,	*	D.C. No. CV-94-00395-HMF
	*	ORDER
	*	(Filed June 4, 1996)
Defendants-Appellants.	*	

Before: **PREGERSON, KOZINSKI,** and **HAWKINS,** Circuit Judges.

The panel has voted to deny plaintiffs' petition for rehearing. Judge Pregerson would grant the petition for rehearing.

An active judge requested a vote on whether to rehear the case en banc, but a majority of nonrecused active judges voted against en banc consideration.

The petition for rehearing is **DENIED** and the suggestion for rehearing en banc is **REJECTED.**

Supreme Court, U.S.
FILED
NOV 1 1996
CLERK

No. 96-521

In The

Supreme Court of the United States

October Term, 1996

ONE WORLD ONE FAMILY NOW, a Hawaii non-profit corporation; JAMES McDONOUGH, an individual; BHAKTIVEDANTA MISSION, LTD., a Hawaii non-profit corporation; and ANTON VOIGHT, an individual,

Petitioners,

v.

CITY AND COUNTY OF HONOLULU; FRANK F. FASI, individually and in his capacity as Mayor of the City and County of Honolulu; MICHAEL NAKAMURA, Chief of Police; DONNA WOO, individually and in her capacity as Special Deputy Attorney General of the State of Hawaii; and John Does 1-10,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTION PRESENTED

Whether the Free Speech Clause of the First Amendment allows a city to enforce a content-neutral ban on peddling on the public streets and sidewalks of a small, historic, aesthetically significant and heavily congested urban district.

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Respondents the City and County of Honolulu, et al. ("the City"), respectfully urge the Court to deny the writ of certiorari sought by petitioners in this case. The decision of the Court of Appeals for the Ninth Circuit in this case upheld the application of the City's general peddling ordinance to petitioners' high-volume sales of T-shirts on the streets and sidewalks of the Waikiki Special District of Honolulu. *One World One Family Now v. City and County of Honolulu*, 76 F.3d 1009 (9th Cir. 1996), reprinted at Pet. App. 1-24. Petitioners claim that their sales implicated the First Amendment because their T-shirts contained some words such as "Take It Easy Meditate Hang Loose Hawaii" alongside "colorful depictions of Hawaii's scenic natural beauty, not unlike shirts sold in retail stores catering to tourists." Pet. App. 3. The district court and the court of appeals below, bound by Ninth Circuit precedent, assumed that such sales do implicate the First Amendment,[1] but held nonetheless that the City's application of the peddling ordinance to such sales amply satisfied this Court's well-settled standards governing content-neutral regulations of the time, place and manner of speech. Pet. App. 6-12. Because that decision is sound and because there are no contrary decisions in any other

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[1] In the proceedings below, the City argued that petitioners' T-shirt sales amounted to conduct, not speech, and thus that the application of a general peddling ordinance to such activity should not trigger any First Amendment scrutiny at all, as in *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986), and like precedents. The City does not abandon that argument here, but there is no need to reach it in order to deny the petition.

circuit, this case does not present an issue warranting this Court's review.

The City's peddling ordinance was enacted in 1957 and has been amended several times since. Revised Ordinances of Honolulu § 29-6.2 (b) (7), reprinted at Pet. 2-3. It permits peddling in public areas throughout Honolulu except for nine specified areas, which were selected because they have special scenic beauty or historical importance, or because they present special problems of pedestrian movement and safety. The Waikiki Special District meets all three criteria: it is an area of great natural beauty and historical importance and, because it is a major visitor destination, its sidewalks are highly congested. See Pet. App. 28-30 (findings of the district court).

As defined in the applicable statutes, the Waikiki Special District covers an area of approximately 507 acres, or about 0.7 square mile, and encompasses about 0.125% of the County of Honolulu, which covers the entire 625 square miles or 400,000 acres of the island of Oahu. The Waikiki Special District was established in 1976 to ensure that Waikiki – which the district court described as "the center of Hawaiian culture and social gatherings for Hawaiians for hundreds of years," Pet. App. 29 – would maintain an ambiance evoking Hawaiian culture, romance, and the Aloha spirit. The ordinance establishing the Special District restricts hotel and apartment sizes and locations within the District, reduces height limitations in certain areas, requires landscaped open space, and promotes a pedestrian-oriented environment. As part of the effort to protect and preserve Waikiki, the sidewalks along Kalakaua Avenue were widened in the late 1980s at substantial public expense to provide a broad

thoroughfare for heavy pedestrian traffic by residents and as many as 60,000 visitors a day. See Pet. App. 29. Trees and outdoor furniture were installed along this route, and bicycles, skateboards, in-line skates, and other wheeled vehicles were banned from the sidewalks.

Petitioners are two of the several groups that began selling T-shirts in 1992 from "display tables on the sidewalks of Kalakaua Avenue, one of the busiest commercial streets in Waikiki." Pet. App. 3. Petitioners conspicuously omit from the Appendix to the Petition for Certiorari four photographic exhibits that the court of appeals expressly reprinted from the record and included in its opinion below. See Pet App. 16. Those photographs, which the City hereby supplies below at App. 1-4, belie petitioners' description of themselves as itinerant street proselytizers who merely sold a few T-shirts on the side. See Pet. 3. To the contrary, those photographs depict large heaps of T-shirts stacked several feet high, covering the entire surface of vending tables where no obvious literature is displayed, no obvious sign identifies the sellers or their cause, and the only information provided pertains to quantity and price, such as "$5 each or 5 for $20." See App. 1. As the district court found, petitioners supplied literature about their causes only "when asked." Pet. App. 27, 28.

Based on a record that included extensive evidence submitted by the City at a two-day preliminary injunction hearing, the district court found that the peddling ordinance furthered "three significant interests": (1) "maintaining the aesthetic attractiveness of Waikiki," (2) "promoting public safety and the orderly movement of

pedestrians," and (3) "protecting the local merchant economy." Pet. App. 48; see Pet. App. 7. The court of appeals, in an opinion authored by Judge Kozinski and joined by Judge Hawkins over Judge Pregerson's dissent, agreed that these interests were "substantial," Pet. App. 8-9, and that the city had demonstrated that they were its "actual" interests, Pet. App. 10. The court of appeals also found that "[n]one of these interests concerns the content of speech," and thus that the peddling ordinance is entirely content-neutral. Pet. App. 7.

Finally, the court of appeals held that "the peddling ordinance is narrowly tailored to serve these interests" under the standard set forth by this Court in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). Pet. App. 10. As the court of appeals noted, "Without the ordinance, sidewalk vendors (commercial and charitable alike) would be free to peddle their wares on Kalakaua and Kuhio Avenues, undermining the city's efforts to provide a pleasant strolling and shopping area. . . . A proliferation of sidewalk vendors could also aggravate the congestion on already crowded sidewalks and siphon off sales from local merchants." *Id.* Accordingly, the City's interests " 'would be achieved less effectively absent the regulation.' " *Id.* (quoting *Ward*, 491 U.S. at 799). The city " 'did no more than eliminate the exact source of the evil it sought to remedy.' " Pet. App. 11 (quoting *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 808 (1984)). And the city left open "ample alternative channels of communication," Pet. App. 11, leaving petitioners entirely "free to disseminate and seek financial support for their views" throughout Waikiki by "handing out literature, proselytizing or soliciting donations," by "hand[ing] out free

T-shirts to passers-by," or by "mingl[ing] with Waikiki's tourist throngs wearing T-shirts (thereby acting as human billboards)." Pet. App. 12.

On the basis of this "ample evidence" of "basic and traditional" government interests and "ample alternative channels for plaintiffs to communicate their messages," the court of appeals held it constitutional for the City to apply the peddling ordinance to petitioners' sales throughout the Waikiki Special District. Pet. App. 14-15.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW CORRECTLY APPLIED WELL-SETTLED TIME, PLACE AND MANNER LAW.

The court of appeals applied this Court's well-settled time, place and manner law in a conventional and straightforward manner to Honolulu's indisputably content-neutral peddling ordinance. Nothing in the decision below conflicts with any precedent in this Court, nor does its reasoning raise any unresolved First Amendment issue of exceptional importance. Attempting to manufacture such an issue, petitioners claim that the court below erred, first, in treating the peddling ordinance as a place or manner regulation rather than a complete ban (Pet. 10-12); second, in holding that the city's substantial interests apply throughout the Waikiki Special District (Pet. 13-15, 17-19); and third, in declining to mandate selective, content-based exemptions from the peddling ordinance as a supposedly less restrictive alternative (Pet. 15-17, 20-21). All three claims are meritless.

A. The Peddling Ordinance is a Place or Manner Regulation, Not a Complete Ban.

Contrary to petitioners' mischaracterization, the peddling ordinance is *not* "a complete ban on a medium of protected expression." Pet. 10; *see id.* at 12, 13, 21. First, the peddling ordinance is not directed at expression. Rather, it bars street sales of *all* "goods, wares, merchandise, foodstuffs, refreshments or other kinds of property or services" – from suntan oil and beach mats to transistor radios and T-shirts. Honolulu, Haw. Rev. Ordinances § 29-6.2 (b) (7), reprinted at Pet. 2. Second, it is not a complete ban. Honolulu has *not* banned peddling city-wide, but rather *permits* peddling city-wide, with the narrow exception of nine specified areas including Waikiki, an area comprising only 507 acres. Accordingly, the court below correctly reviewed the ordinance as applied to petitioners' activities as simply a regulation of the place or manner of speech.

For this reason, petitioners' reliance upon this Court's decision in *City of Ladue v. Gilleo*, 114 S. Ct. 2038 (1994), see Pet. 12, 20, is wholly misplaced.[2] *Ladue* invalidated a ban on posting signs on private residential property. The ban there was aimed at expression, and was city-wide. Honolulu's peddling ordinance is neither. Peddling of all goods, not only those with words on them, is

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[2] Because the Honolulu peddling ordinance is not a complete ban on a medium of expression, petitioners' reliance on such cases as *Schneider v. State*, 308 U.S. 147 (1939) (invalidating a ban on handbilling), and *Martin v. Struthers*, 319 U.S. 141 (1943) (invalidating a ban on door-to-door solicitation), see Pet. 11, is likewise misplaced.

foreclosed on public sidewalks in Waikiki. Petitioners may peddle T-shirts freely throughout virtually all of Honolulu's public spaces simply by crossing the streets or canals that mark the boundaries of Waikiki. And they are free to sell T-shirts as much as they please on private property, including in Waikiki. See Pet. App. 12. Thus Honolulu, unlike Ladue, has not "suppress[ed] too much speech." 114 S. Ct. at 2045.

Moreover, the Court in *Ladue* characterized the posting of signs on one's own home as "a venerable means of communication that is both unique and important," *id.*, because it provides "information about the identity of the 'speaker,' " *id.* at 2046. In contrast, the court below correctly found that selling T-shirts is not similarly unique, because the sale of T-shirts on public sidewalks "does nothing to make the message uniquely significant or effective." Pet. App. 13-14. Indeed, this Court in *Ladue* expressly noted that its holding might well have been different "in the case of signs (whether political or otherwise) displayed by residents for a fee." 114 S. Ct. at 2047 n.17. Thus the court below properly concluded that, "[w]hile *wearing* a message-bearing T-shirt might be a uniquely valuable mode of communication . . . , the same can't be said for *selling* such a T-shirt on the sidewalk." Pet. App. 13.[3]

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[3] As Judge Ginsburg similarly observed in a recent case that is discussed more fully in Part II below, "T-shirts may be communicative, but their sale does not add anything to ISKCON's ability to communicate its ideas to passers-by on the Mall. Whereas a book, a tape, a newspaper, or a handbill is a convenient way of communicating more information than can be relayed on sandwich boards or by engaging a stranger in

Thus the court below correctly held that this case is governed not by any decisions involving complete medium bans, but rather by the long line of decisions upholding content-neutral place or manner regulations that simply displace a particular medium of speech from the speaker's desired location. For example, in *Heffron v. ISKCON*, 452 U.S. 640 (1981), the Court upheld a state fair regulation that barred sales, solicitation and literature distribution in all the public thoroughfares of a 125-acre state fairgrounds, confining them instead to fixed, rented booths. In *Frisby v. Schultz*, 487 U.S. 474 (1988), the Court upheld a municipal ordinance that banned from public streets and sidewalks all picketing, even on public issues, that was targeted at people's homes. In *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984), the Court held that, under the time, place or manner test generally applicable to public forums, *see id.* at 808-10, a city could completely ban the posting of political signs on public utility poles. And in *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), the Court upheld a ban on camping in Lafayette Park and the Washington Mall as applied to demonstrators protesting homelessness through the symbolic conduct of sleeping overnight in those parks.

In light of these decisions, there is no basis for petitioners' assertion that "[t]his Court has never sanctioned

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conversation, the message printed on . . . a T-shirt . . . is just as well communicated by its display as by its sale." *ISKCON of Potomac, Inc. v. Kennedy*, 61 F.3d 949, 961 (D.C. Cir. 1995) (D. Ginsburg, J., concurring in part and dissenting in part on other grounds).

a complete ban on a medium of protected expression in a traditional public forum as vast as that at issue here." Pet. 10-11. To the contrary, the Court routinely upholds content-neutral conduct or time, place or manner regulations that are justified by substantial government interests, regardless of how large an area is affected. In *Clark*, for example, the Court upheld the camping ban as applied to anti-homelessness demonstrators throughout park areas stretching "some two miles" through the heart of the nation's capital. 468 U.S. at 290. What matters is not the size of the area affected, but rather the relevance of the government goals to the area covered by a regulation. As this Court observed in *Frisby*, even "[a] complete ban can be narrowly tailored" so long as "each activity within the proscription's scope is an appropriately targeted evil." 487 U.S. at 485 (citing *Taxpayers for Vincent*).

By petitioners' logic, any place restriction on a medium of speech could be recharacterized as a "complete ban" on speech in some area, such as a particular sidewalk or street corner or zoning district. This logic must be rejected, for it would turn time, place and manner law on its head. Accordingly, the court below was entirely correct to "use the standard governing time, place and manner restrictions" to review the application of the peddling ordinance to petitioners' activities. Pet. App. 6.

B. The Peddling Ordinance is Narrowly Tailored to the City's Substantial Aesthetic, Safety, and Economic Interests.

A content-neutral law such as the peddling ordinance is narrowly tailored so long as it serves substantial

government interests that "would be achieved less effectively absent the regulation." *Ward v. Rock Against Racism*, 491 U.S. at 799. *See also Clark v. Community for Creative Non-Violence*, 468 U.S. at 297. This test does not require that the City employ the least restrictive alternative, but only that a regulation not be "*substantially* broader than necessary to achieve the government's interest." *Ward*, 491 U.S. at 800. The court below correctly concluded that the record below easily satisfied this test.

Petitioners do not contest the substantiality of the City's interests in avoiding visual blight or averting pedestrian traffic congestion. Nor could they, given this Court's long treatment of such government interests as significant and substantial for purposes of time, place and manner analysis.[4] As Justice Stevens wrote for the Court in *Taxpayers for Vincent*, "municipalities have a weighty, essentially esthetic interest in proscribing intrusive and unpleasant forms for expression," 466 U.S. at

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[4] Petitioners do contest the substantiality of the City's interest in protecting its merchant economy from unfair competition by vendors of similar products who incur no overhead or tax obligations. See Pet. 14. Any such argument is foreclosed, however, by this Court's decision in *Turner Broadcasting, Inc. v. FCC*, 114 S. Ct. 2445 (1994), which held that government interests in preserving an industry or in fostering fair economic competition are plainly substantial enough to sustain a content-neutral regulation of speech, so long as the regulation is narrowly tailored. *See id.* at 2470 ("[T]he Government's interest in eliminating restraints on fair competition is always substantial, even when the individuals or entities subject to particular regulations are engaged in expressive activity protected by the First Amendment.").

806, and "visual assault on the citizens" of a city "constitutes a significant substantive evil within the City's power to prohibit," *id.* at 807. *See also Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507-08 (1981). Likewise, the Court has long held that government may protect the "safety and convenience" of persons using a public forum, *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941), including by "maintain[ing] the orderly movement of the crowd," *Heffron*, 452 U.S. at 649-50. In particular, this Court has repeatedly acknowledged that speech activities that involve the face-to-face exchange of money, as do the sales at issue in this case, are especially likely to cause problems of pedestrian traffic congestion in crowded areas, and has repeatedly deferred to content-neutral sales and solicitation regulations aimed at controlling such problems. *See id.* at 653-54 (upholding a sales and solicitation ban at state fair); *id.* at 664-65 (Blackmun, J., concurring in part and dissenting in part); *United States v. Kokinda*, 497 U.S. 720, 733-34 (1990) (plurality opinion) (upholding a solicitation ban on post office sidewalks); *id.* at 739 (Kennedy, J., concurring in judgment under traditional time, place and manner analysis); *ISKCON v. Lee*, 505 U.S. 672, 683-84 (1992) (upholding a solicitation ban in public airport terminals); *id.* at 689-90 (O'Connor, J., concurring and concurring in judgment); *see also Henderson v. Lujan*, 964 F.2d 1179, 1185 (D.C. Cir. 1992) (noting that "free distribution of literature is far less disruptive than solicitation" of money in public forums).

Petitioners quarrel rather with the fit between the peddling ordinance and these indisputably substantial and content-neutral ends. They contend, first, that the court of appeals improperly found the City's interests to

apply to all streets of Waikiki, rather than only to the principal commercial thoroughfares of Kalakaua and Kuhio Avenues. See Pet. 17-19. The district court, perhaps attempting a Solomonic resolution of this controversy, had found that the peddling ordinance served the City's interests on the main streets but not the side streets of Waikiki. See Pet. App. 52-53. The court of appeals reversed the latter determination and found the ordinance narrowly tailored to the City's interests throughout the whole of Waikiki. Pet. App. 14-15.

Contrary to petitioners' contentions, this holding was plainly within the authority of the court of appeals, and was plainly correct on the merits. Whether or not the ordinance is adequately tailored to the City's interests under the First Amendment is a question of law or at most a mixed question of law and fact subject to de novo review by an appellate court. *See Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 115 S. Ct. 2338, 2344 (1995). Petitioners thus err in describing it as a "finding of fact" requiring deference to the district court. Pet. 17. Moreover, the court of appeals was correct to hold on the merits that, under this Court's precedents, "[c]ities need not prove up their interests on a block-by-block basis, particularly where the interests asserted are as basic and traditional as Honolulu's." Pet. App. 14. By redrawing the map of Waikiki along lines no party had suggested, the district court had ignored this Court's admonition in *Clark v. CCNV* that intermediate scrutiny of content-neutral regulations "do[es] not . . . assign to the judiciary the authority to replace the Park Service as the manager of the Nation's parks," nor the City as manager of its public sidewalks. 468 U.S. at 299. The

court of appeals correctly applied a far more appropriate level of scrutiny in upholding the peddling ordinance boundaries as drawn by the City.[5]

Petitioners assert, second, that the many alternative channels of expression that Honolulu has left open to them are not enough. See Pet. 20-21. They claim that "petitioners are totally excluded from the entire Waikiki area, which is the only viable place where they can reach their intended audience." Pet. 21. This claim is baseless. Petitioners are in no way excluded from Waikiki; only their sales activities are excluded. As the court below correctly found, petitioners are free to speak on Waikiki streets in " 'myriad and diverse' " ways, including "handing out literature, proselytizing or soliciting donations," as well as handing out or wearing T-shirts. Pet. App. 12. This Court has always found such alternatives sufficient in parallel cases. *See, e.g., Heffron*, 453 U.S. at 640 (noting that Hare Krishna proponents were free in the open spaces of the state fair to "mingle with the crowd and orally propagate their views"); *Frisby*, 487 U.S. at 484 (noting that picketers were free to march, proselytize and distribute literature). Moreover, petitioners are free to sell

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[5] Petitioners also suggest that the court of appeals improperly shifted the burden from the City to the speaker by noting that Honolulu's interests "can be presumed to operate throughout a city, absent a strong showing to the contrary." Pet. App. 15; see Pet. 17-18. This suggestion is misguided. Petitioners take this statement out of context. In context, it simply punctuates the court's conclusion, upon careful review of the record, that "[t]here was ample evidence . . . that the city's interests in open and attractive sidewalks and fair competition extended throughout Waikiki." Pet. App. 14 (citing record evidence).

T-shirts on virtually every public space in Honolulu outside of Waikiki. Waikiki may well be the most lucrative vending site, but petitioners have offered no reason why selling T-shirts on the streets of Waikiki is the only possible way they can disseminate their views.

To the extent that petitioners suggest that they enjoy an absolute right to reach their intended audience by way of their chosen medium, they are incorrect as a matter of law. All time, place and manner regulations deprive speakers of their intended communication with an intended audience, but all time, place and manner regulations are not therefore unconstitutional. To the contrary, as this Court has noted, "[i]t is common ground that the First Amendment does not guarantee the right to communicate one's views at all times and places in any manner that may be desired." *Heffron*, 452 U.S. at 647; *see Adderly v. Florida*, 385 U.S. 39, 48 (1966).

Accordingly, the court of appeals was correct to find the peddling ordinance narrowly tailored to the City's substantial aesthetic, public safety and economic interests under the standard set forth by this Court in *Ward*.

C. Content-Based Exemptions from the Peddling Ordinance Are Not a Less Restrictive Alternative.

Petitioners concede, as they must, that a content-neutral regulation "need not be the least restrictive or least-intrusive means" of serving governmental interests. *Ward*, 491 U.S. at 798, quoted at Pet. 15. They complain nonetheless that the court of appeals declined to order the City to adopt "a number of realistic, obvious and less-

burdensome alternatives." Pet. 15. For example, they suggest that "the City could limit sales activities to qualified nonprofit organizations," and limit the merchandise they may sell to items that are "inherently communicative," or that "contain a message of intellectual content that is inextricably intertwined with a statement carrying a religious, political, philosophical or ideological message." Pet. 16.

If there were any First Amendment problem with the peddling ordinance, that cure would surely be worse than the disease. To require the City to scrutinize T-shirt messages for their "intellectual content" would require content discrimination of a kind usually repugnant to the First Amendment. To require police officers on the beat on crowded city streets to ensure that the specially exempted vendors' merchandise was sufficiently "religious, political, philosophical or ideological" would surely be a First Amendment nightmare. Nor is it an obvious answer to say all "nonprofits" could simply sell what merchandise they wished. For in *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993), this Court held that a city may not allow noncommercial speech in a public forum while banning commercial speech that poses the identical harms – in that case, sidewalk clutter that was equally ugly and dangerous whether newsracks were commercial or noncommercial. Thus the nonprofit/for-profit distinction urged by petitioners might itself be deemed impermissibly content-based under *Discovery*, assuming that sidewalk sales of non-profit organizations' T-shirts saying "Take It Easy Meditate Hang Loose Hawaii" cause just as much unattractive and pedestrian-

impeding clutter as would sidewalk sales of commercial T-shirts urging readers to "Just Be," or "Just Do It."

Clearly Honolulu need not open up the public streets and sidewalks of Waikiki to all peddling, turning the district into a flea market or a street bazaar. Yet granting petitioners' proposed exemptions from the flat peddling ordinance upheld below would necessitate dangerous distinctions between expressive and non-expressive T-shirt sales. Far from being less restrictive of speech, such an approach would be more restrictive, entangling government in content determinations now wholly absent from the administration of the ordinance. In like circumstances, this Court has held that a flat ban is preferable to a regime of content-based exemptions. *See, e.g., Clark v. CCNV*, 468 U.S. at 297 (noting that distinguishing expressive from non-expressive camping "would present difficult problems for the Park Service"); *Taxpayers for Vincent*, 466 U.S. at 816.

Accordingly, the court of appeals was correct to reject petitioners' misguided suggestions of supposedly less restrictive alternatives, and to hold that "Honolulu's peddling ordinance isn't 'substantially broader than necessary' to achieve its interests." Pet. App. 11.

II. THE DECISION BELOW PRESENTS NO CIRCUIT CONFLICT.

Petitioners correctly concede that "the panel decision is not directly in conflict with other decisions of the courts of appeals." Pet. 10 n.4. They conspicuously fail to mention anywhere in their petition, however, the only other circuit court decision in a closely analogous case – a decision that is fully in accord with the decision of the

Ninth Circuit below. In *ISKCON of Potomac, Inc. v. Kennedy*, 61 F.3d 949 (D.C. Cir. 1995), the Court of Appeals for the District of Columbia Circuit upheld against First Amendment challenge a National Park Service regulation prohibiting sales of message-bearing T-shirts, audiotapes, religious beads and other merchandise on the Washington Mall and other park lands in the national capital. *ISKCON*, like the decision below, correctly concluded that, even if sales of expressive merchandise count as speech, they are subject, like any speech, to narrowly tailored content-neutral laws.

The National Park Service regulation at issue in *ISKCON* exempted sales of books, newspapers, leaflets, pamphlets, bumper stickers, and buttons from the Service's general ban on the sale of merchandise within National Capital Region parks. *See ISKCON v. Kennedy*, 61 F.3d at 952. The effect of this regulation was to ban sales of other arguably expressive merchandise not included in the exemption, such as T-shirts, religious beads and audio tapes – even though a previous Park Service enforcement guideline had briefly permitted such expressive merchandise to be sold. *See id.* The Park Service had closed this loophole, restoring message-bearing T-shirts and like items to the default position of the general sales ban, because the parks had been subject to a massive proliferation of vending activity, especially on the Mall, and especially involving T-shirts. The Park Service deemed this T-shirt proliferation an "unsightly, inappropriate and an unwelcome commercial intrusion." *Id.* at 957 (quoting 59 Fed. Reg. 25,857).

In a challenge brought by vendors of religious beads and audio tapes, the D.C. Circuit held that "the sale of

[ISKCON's] audio tapes is protected under the First Amendment," *id.* at 954, but held nonetheless that the Park Service regulation was content-neutral and subject only to the intermediate scrutiny appropriate to review of "time, place and manner" regulations, *id.* at 956-58. Under that standard, *ISKCON* easily found the Park Service anti-vending regulations constitutional, as they served a substantial interest in reducing commercialism in the nation's capital's parks. Indeed, the D.C. Circuit appeared to assume that a flat ban on all merchandise sales in the parks to serve this interest would be clearly constitutional. The only feature of the regulation that made the case at all difficult, and that divided the majority from the dissent, was its underinclusiveness – printed matter, bumper stickers and buttons could be sold but T-shirts, audio tapes and religious beads could not. The majority concluded that this underinclusiveness was not fatal because the regulation "does not favor one side of an issue and its rationale is not undermined by its exemptions." *Id.* at 957. In the present case, of course, there is no comparable issue of underinclusiveness. The Honolulu ban is a flat ban, and petitioners do not contest the finding of the court of appeals below that narrow exceptions for newspapers and parade buttons and souvenirs are content-neutral. See Pet. App. 7-8 n.5.

Petitioners cite several district court decisions as allegedly in conflict with the decision below. Pet. at 10 n.4. These claimed conflicts are illusory.[6] Particularly

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[6] Two of the district court decisions claimed by petitioners to "conflict with" the Ninth Circuit decision below are incapable of so conflicting because they are from districts within and

misleading is petitioners' citation of *Friends of the Vietnam Veterans Memorial v. Kennedy*, 899 F. Supp. 680 (D.D.C. 1995). In *Friends*, Judge Sporkin, for the district court, purported to invalidate the very same Park Service regulation that the D.C. Circuit had upheld the previous month in *ISKCON*, the court of appeals decision unmentioned by petitioners. Not surprisingly, as petitioners fail to mention, the United States has moved for summary reversal of *Friends* on the ground that there is no meaningful First Amendment distinction between the sales of T-shirts at issue in *Friends* and of audio tapes and religious beads at issue in *ISKCON*, and thus that the district court decision defies the governing authority of *ISKCON*. *See Friends of the Vietnam Veterans Memorial v. Kennedy*, No. 95-5393, Motion for Summary Reversal filed Jan. 4, 1996 (D.C. Cir.). That motion remains pending. Except in the unlikely event that the D.C. Circuit were to affirm *Friends* and overrule *ISKCON*, there is no circuit conflict on the permissibility of applying general content-neutral sales bans to sales of message-bearing T-shirts. Rather, the Ninth and the D.C. Circuits – the only two circuits yet to address the issue – agree that a government may apply content-neutral regulations against sales, even of allegedly expressive merchandise, in portions of a city's

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governed by the Ninth Circuit. *See One World One Family Now v. Nevada*, 860 F. Supp. 1457 (D. Nev. 1994); *ISKCON v. San Diego Unified Port Dist.*, No. 91-1768-B(LSP) (S.D. Cal. Dec. 10, 1992). Nor do they "conflict with" the decision below on the merits, for they each involved issues of standardless discretion wholly absent from the flat ban at issue in this case. See Pet. App. 6. The same is true of *One World One Family Now v. City of Key West*, 852 F. Supp. 1005 (S.D.Fla. 1994); *see id.* at 1010.

public spaces in order to protect important public interests.

CONCLUSION

For these reasons, Respondents respectfully urge the Court to deny the writ of certiorari sought by petitioners in this case.

Respectfully submitted,

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November 1, 1996

APPENDIX

[Following are four photographic exhibits that were included by the court of appeals below in an Appendix to its decision, *see One World One Family Now v. City and County of Honolulu*, 76 F. 3d 1009, 1016-1019 (9th Cir. 1996), but deliberately omitted by petitioners from the Appendix to the Petition, see Pet. App. 16.]

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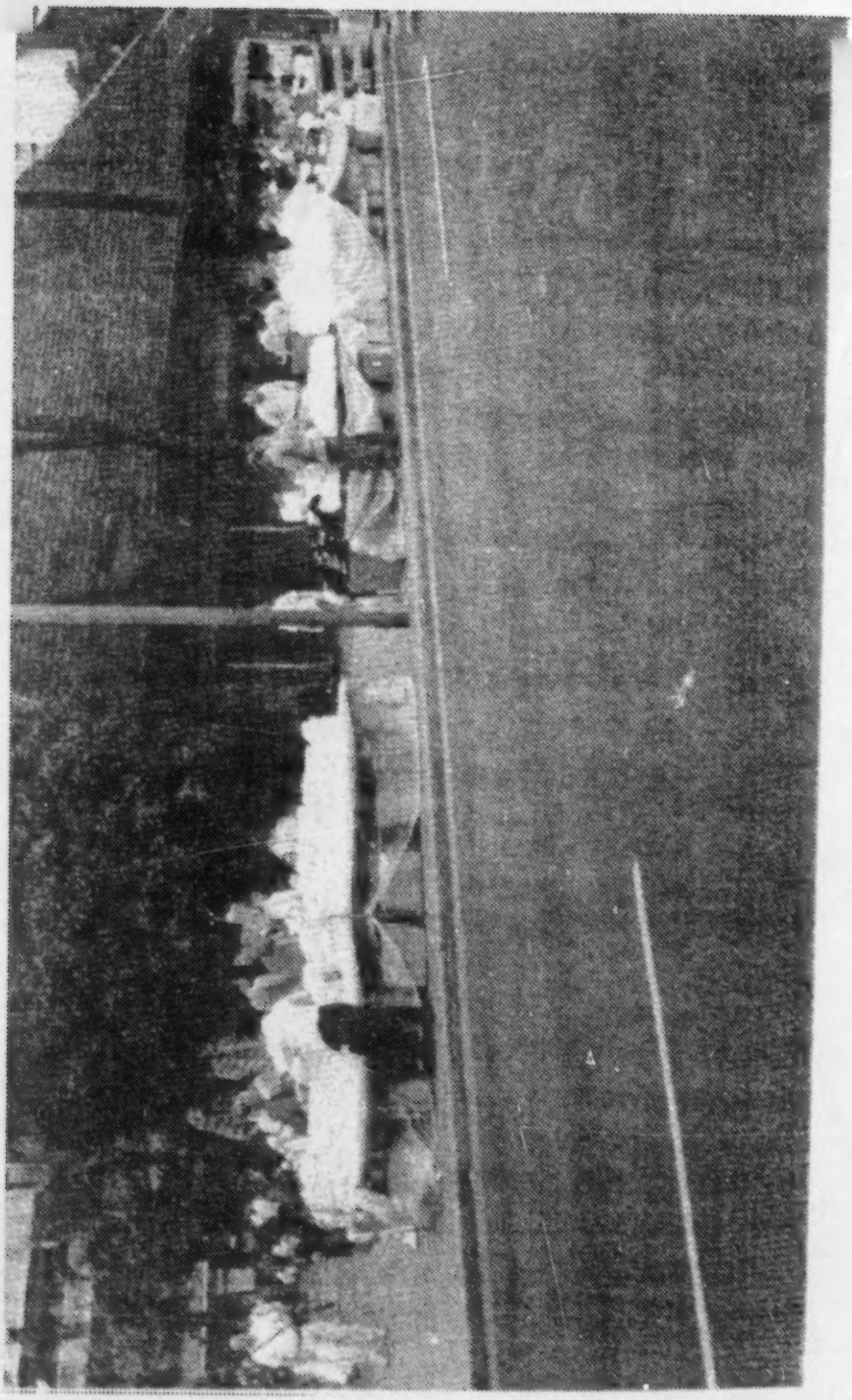

No. 96-521

(3)

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

ONE WORLD ONE FAMILY NOW, A Hawaii non-profit corporation; JAMES McDONOUGH, an individual; BHAKTIVEDANTA MISSION, LTD., a Hawaii non-profit corporation; and ANTON VOIGHT, an individual,

Petitioners,

v.

CITY AND COUNTY OF HONOLULU; FRANK F. FASI, individually and in his capacity as mayor of the City and County of Honolulu; MICHAEL NAKAMURA, Chief of Police; DONNA WOO, individually and in her capacity as Special Deputy Attorney General of the State of Hawaii; and JOHN DOES 1-10,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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INTRODUCTION

This Court has long afforded First Amendment protection to many forms of peaceful expression in their myriad manifestations. *See, e.g., Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 231 (1977). The Court has also emphasized that "[w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public." *Hague v. CIO*, 307 U.S. 496, 515 (1939). Indeed, "[n]o particularized inquiry into the precise nature of a particular street is necessary; all public streets are held in the public trust and are properly considered traditional public fora" *Frisby v. Schultz*, 487 U.S. 474, 481 (1988), where "the government's ability to permissibly restrict expressive conduct is very limited." *United States v. Grace*, 461 U.S. 171, 177 (1983).

The panel decision upholding a complete ban (as opposed to regulation) on the sale of message-bearing T-shirts in the entire Waikiki District – a quintessential public forum – is an unprecedented departure from these fundamental principles. Not only does the panel opinion directly conflict with a recent decision of the Second Circuit Court of Appeals, but, as explained below, it underscores the exceptional importance of the First Amendment values that are at the forefront of this case.

I. THERE EXISTS A DIRECT SPLIT BETWEEN THE NINTH AND SECOND CIRCUITS AS TO THE APPLICATION OF GENERAL VENDING LAWS TO THE EXERCISE OF FIRST AMENDMENT SALES ACTIVITIES.

Since filing their petition for writ of certiorari, petitioners have discovered a recent opinion by the Court of Appeals for the Second Circuit pertaining to application

of a commercial vending law to First Amendment sales activities that directly conflicts with the panel opinion here. In *Bery v. City of New York*, Nos. 95-9089(L), 95-9131, 96-7137, 1996 WL 580938 (2d Cir. Oct. 10, 1996) (to be reported at 97 F.3d 689), the court of appeals considered a General Vendors Law that barred visual artists from selling or offering their works for sale in public places in New York City without first obtaining a general vendors license. *Id.* at *1. By virtue of a 1982 amendment, vendors of newspapers, books and other written matter were not subject to the law. *Id.* Additionally, the number of permits was limited to 853 at any particular time, except that qualified vendors who were also veterans were permitted to exceed that number, resulting in a total of 1,193 licenses. *Id.*

In finding the law unconstitutional, the court emphasized several principles that directly conflict with the panel opinion here. First, as do respondents here, Br. Opp. at 1, the City viewed visual art as "mere 'merchandise' lacking in communicative concepts or ideas." *Id.* at *5. The court of appeals, however, condemned this "restricted view of the First Amendment and of visual art itself." *Id.* "Such myopic vision," the court declared, "not only overlooks case law central to First Amendment jurisprudence but fundamentally misperceives the essence of visual communication and artistic expression." *Id.*

Second, both the City and respondents, as well as the court below, seek to distinguish the expressive item from its sale. Br. Opp. at 4. The City, accordingly, argued, like respondents here, that the " 'expression' allegedly impinged by the Regulation is not in fact their art, but their peddling of the art." *Bery*, 1996 WL 580938 at *5. The City further argued, as do respondents and the panel

below, "that appellants are free to display their artwork publicly without a license, they simply cannot sell it." *Id.* The court of appeals was not persuaded. "The sale of protected materials," the court affirmed, "is also protected" *id.*, and "without the money, the plaintiffs would not have engaged in the protected expressive activity." *Id.* at *6. The court further observed that "the street marketing" was an integral "part of the message of appellants' art." *Id.*

Unlike respondents here, Br. Opp. at 5-6, the court of appeals was also inclined to view the regulation as a complete ban on speech, as opposed to a garden variety time, place and manner regulation as petitioners suggest. According to the court, "[t]he ordinances's effective bar on the sale of artwork in public places raises concerns that an entire medium of speech is being lost." *Id.* at *7 (citing *City of Ladue v. Gilleo*, 512 U.S. 43 (1994)). Because the court nonetheless found the restriction to be an invalid time, place and manner regulation, it declined to reach that issue. *Id.*[1]

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[1] *Heffron v. International Soc'y for Krishna Consciousness*, 452 U.S. 640 (1981), *Frisby v. Schultz*, 487 U.S. 474 (1988), *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984), and *Clark v. Community for Creative Nonviolence*, 468 U.S. 288 (1984) do not support *a complete ban* on protected expression as respondents suggest. Br. Opp. at 8-9. Neither *Heffron*, *Frisby*, nor *Clark* entailed a complete ban of speech activities, but rather provided access to the relevant forum under narrowly tailored time, place and manner regulations. *Heffron*, for example, explicitly pointed out that it is "inaccurate to say that Rule 6.05 constitutes a ban on . . . protected activity in the relevant public forum." 452 U.S. at 655. So too did the Court in *Clark* make clear that the restriction on overnight camping was not a complete ban on a form of protected expression, and "otherwise left the

The court acknowledged the City's "significant interest in keeping its public spaces safe and free of congestion." *Id.* However, because the regulation effectively barred the artists from displaying or selling their art on the streets, it found it to be "a de facto bar preventing visual artists from exhibiting and selling their art in public areas in New York." *Id.*

As did Judge Pregerson and petitioners here, the court in *Bery* suggested less restrictive alternatives to the ban as part of its narrow tailoring analysis. "The City may enforce narrowly designed restrictions as to where appellants may exhibit their works in order to keep the sidewalks free of congestion and to ensure free and safe public passage on the streets, but *it cannot bar an entire category of expression* to accomplish this accepted objective when more narrowly drawn regulations will suffice." *Id.* (emphasis added).[2] And, unlike the panel here, *Bery* found that the exceptions provided "for veterans and vendors of written material call into question the City's

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demonstration intact, with its symbolic city, signs, and the presence of those who were willing to take their turns in a day-and-night vigil." 468 U.S. at 295. In *Frisby*, the Court did not ban residential picketing altogether, but rather required that it be performed in a peripatetic manner. 487 U.S. at 483. And, unlike the situation here, *Taxpayers for Vincent* concerned a nonpublic forum, where the government enjoys much greater latitude in restricting speech.

[2] The court acknowledged, as do petitioners, that the "display of large, cumbersome works" that would block the streets and sidewalks could be subject to "discrete regulation as to time, place and location." *Bery*, 1996 WL 580938 at *8.

argument that the regulation is narrowly tailored." *Id.* at *8.[3]

Finally, as do respondents and the court below, the City argued that "appellants may sell their artwork from their homes or seek permission to display it in restaurants and street fairs and the like." *Id.* at *8 The court, however, firmly maintained that "appellants are entitled to a public forum for their expressive activities. . . . Displaying art on the street has a different expressive purpose than gallery or museum shows; it reaches people who might not choose to go into a gallery or museum or who might feel excluded or alienated from those forums." *Id.* at *8. Unlike the panel here, *Bery* concluded that "[t]he sidewalks of the City must be made available for appellants to reach their intended audience. The City has thus

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[3] *See, e.g., Henderson v. Lujan*, 964 F.2d 1179, 1185 (D.C. Cir. 1992) (government's interest in maintaining an atmosphere of calm, tranquility and reverence in the vicinity of the Vietnam Veterans Memorial did not extend to the sidewalks functioning as the entrance to the Memorial, where "the value of serenity . . . is already severely compromised, both by the presence of many pedestrians not visiting the Memorial and by the constant flow of vehicles, including trucks, along Constitution Avenue itself and even within the 13-foot wide service road lying between Constitution and the sidewalk."); *United States v. Doe*, 968 F.2d 86, 89 (D.C. Cir. 1992) (court found decibel restriction on the volume of musical instruments in Lafayette Park to burden substantially more speech than required; government's interest only marginally applicable to the National Capital Region parks, including the Mall, which are "exposed to every form of urban commotion – passing traffic, bustling tourists, blaring radios, performing street musicians, visiting school children.").

failed to meet the requirement of demonstrating alternative channels for appellants' expression." *Id.* at *9.[4]

Bery is thus fully applicable to the facts, circumstances and legal theories relevant to this petition in that it creates a direct conflict with the holdings reached by the majority below.

II. THE RATIONALE AND HOLDING OF *BERY* IS FULLY CONSISTENT WITH THE PRIOR DECISIONS OF THIS AND OTHER COURTS.

The rationale of *Bery* finds expression in analogous decisions of this Court and other courts. In *Murdock v. Pennsylvania*, 319 U.S. 105 (1942), for example, the Court recognized that even "the pamphlets of Thomas Paine were not distributed free of charge. It is plain that a religious organization needs funds to remain a going concern." *Id.* at 110-11. In more recent times, the Court has observed that "virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs." *Buckley v. Valeo*, 424 U.S. 1, 19 (1976). And, in *United States v. National Treasury Employees Union*, 115 S. Ct. 1003 (1995) this Court found that "[a]lthough § 501(b) [of the Ethics in Government Act of 1978] neither prohibits any speech nor discriminates among speakers based on the content or viewpoint of their messages, its prohibition on compensation [for making speeches or writing articles] imposes a significant burden on expressive activity." *Id.*

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[4] The court of appeal also found that the exception for the sale of books, newspapers and other written matter must fall under the Equal Protection Clause. *Bery*, 1996 WL 580938 at *9.

at 1014. The Court explained that the ban on "compensation for lower-paid, nonpolicymaking employees will inevitably diminish their expressive output" and will "impose[] a significant burden on the public's right to read and hear what the employees would otherwise have written and said." *Id.* at 1015. The Court thus held that "the honoria ban imposes the kind of burden that abridges speech under the First Amendment." *Id.*

In finding "parody trading cards" featuring active major league baseball players to be fully protected speech, the court in *Cardtoons v. Major League Baseball Players Association*, 95 F.3d 959 (10th Cir. 1996) emphasized that the protection is not lessened because the materials are sold rather than given away. The court observed that "many untraditional forms of expression are . . . protected by the First Amendment" *id.* at 969, and "even if the trading cards are not a traditional medium of expression, they nonetheless contain expressive speech." *Id.*

Unlike the panel here, the court in *Cardtoons* further concluded that the trading cards were not "commercial merchandise rather than protected speech," and could "see no principled distinction between speech and merchandise that informs our First Amendment analysis." *Id.* at 969-70. In contrast to the panel decision here, the court stated that "the fact that expressive materials are sold neither renders the speech unprotected, . . . nor alters the level of protection under the First Amendment." The court thus concluded that Cardtoons need not give away its trading cards in order to bring them within the ambit of the First Amendment. *Id.* at 970.

And in perhaps the most definitive statement yet, the court in *Friends of the Vietnam Veterans Memorial v. Kennedy*, 899 F. Supp. 680 (D.D.C. 1995) observed with respect to the sale of message-bearing T-shirts as follows:

> Allowing groups to give away T-shirts is not an ample alternative means of communication. Few non-profit groups can afford to give away large numbers of message-bearing T-shirts, which cost money to design, print and produce. The sale of T-shirts is also the primary means by which many . . . groups are able to raise money in order to continue to engage in spreading their message.

Id. at 685.

Contrary to respondents' assertion that there are no "unresolved First Amendment issue of exceptional importance," Br. Opp. at 5, the question of whether sales activities tied to the dissemination of expressive materials may be banned is one of extraordinary significance that will have a profound affect on the activities of thousands of First Amendment practitioners.

III. *ISKCON V. RIDENOUR* DOES NOT SUPPORT THE DECISION OF THE PANEL IN THE PRESENT CASE.

In an attempt to magnify the impact of *ISKCON of Potomac, Inc. v. Kennedy*, 61 F.3d 949 (D.C. Cir. 1995) on the present case, respondents accuse petitioners of concealing *ISKCON* from this Court. Br. Opp. at 16-17. This accusation is false.

In *ISKCON*, a majority panel upheld the constitutionality of 36 C.F.R. § 7.96(k)(2)(1993) as applied to the sale of religious *beads* and *audio cassette tapes* by members of the Hare Krishna religion in the National Capital

Region parks. *ISKCON* was extensively discussed and distinguished in *Friends of the Vietnam Veterans Memorial v. Kennedy*, 899 F. Supp. 680 (D.D.C. 1995), where Judge Sporkin enjoined enforcement of *amended* section 7.96(k)(2)(1995) as applied to the sale of message-bearing T-shirts. Petitioners, in turn, have expressly relied upon and cited *Friends* in support of their contention that the Honolulu peddling ordinance is also unconstitutional as applied to their expressive activities. Respondents' accusation of concealment is thus without merit.

So too is respondents' claim that *ISKCON* supports the decision of this panel Br. Opp. at 19. It has long been recognized that each medium of communication is unique unto itself and must be assessed by standards particularly suited to it. *E.g., Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 510 (1981) (plurality opinion). The court in *Friends* duly noted that the majority panel in *ISKCON* "upheld the ban on sales *as applied* to beads and audio-tapes," but "was silent with respect to message-bearing T-shirts." 899 F. Supp. at 683 (emphasis added). The court, therefore, properly analyzed the sales regulation as applied to message-bearing T-shirts, which occasion unique and independent standards distinct from those which attach to religious beads and audio cassette tapes.

There exist other distinctions between *ISKCON* and the present case as well. For example, the *ISKCON* panel focused its "narrow tailoring" analysis on the underinclusiveness of the sales regulation. 61 F.3d at 956-58. Petitioners' narrow tailoring argument in the present case, however, does not turn upon the underinclusiveness of the Honolulu peddling ordinance. Rather, petitioners

rely upon well-established decisions of this Court that make clear that a regulation burdens more speech than necessary if it is not aimed at the exact source of the problem which it seeks to remedy. *E.g., Frisby,* 487 U.S. at 485. Since the Honolulu ordinance is aimed directly at the core of petitioners' expression, rather than at the incidental effects of expression such as pedestrian traffic congestion, it fails to satisfy the standard followed by this Court. As Judge Sporkin thus pointed out in *Friends,* the City has "employed a cleaver where a scalpel would suffice." 899 F. Supp. at 687.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 12, 1996

No. 96-521

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

ONE WORLD ONE FAMILY NOW, a Hawaii non-profit corporation; JAMES McDONOUGH, an individual; BHAKTIVEDANTA MISSION, LTD., a Hawaii non-profit corporation; and ANTON VOIGHT, an individual,

Petitioners,

v.

CITY AND COUNTY OF HONOLULU; FRANK F. FASI, individually and in his capacity as Mayor of the City and County of Honolulu; MICHAEL NAKAMURA, Chief of Police; DONNA WOO, individually and in her capacity as Special Deputy Attorney General of the State of Hawaii; and John Does 1-10,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

SUPPLEMENTAL BRIEF

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SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

In their Reply Brief, Petitioners contend that because of the recent decision in *Bery v. City of New York*, 97 F.3d 689 (2d Cir. 1996), there is now a conflict between the Second and Ninth Circuits regarding the constitutional principles governing sidewalk vending laws. The facts in *Bery* are, however, so dramatically different from those in the present case that the holdings of these cases *are not* in conflict. The *Bery* holding is compatible with the holding of the Ninth Circuit in the present case, and these issues do not require review or clarification from this Court.

The *Bery* court found New York City's city-wide General Vendors Law to be unconstitutional because it was written and enforced in such a way that vendors of artwork were effectively excluded from selling their creations on any sidewalk throughout the city. The New York ordinance required vendors of nonfood goods and services to obtain a permit in order to sell any merchandise on the sidewalk, but only 853 permits were issued (to nonveterans), these permits were rarely available, and the court viewed the ordinance as "a de facto bar preventing visual artists from exhibiting and selling their art in public areas in New York." 97 F.3d at 697.

The *Bery* facts are different from those in the present case in several crucial respects:

(1) The New York City ordinance covered all of New York, and the record prepared in the *Bery* case was not adequate to demonstrate that a total ban on the display of artwork on all the sidewalks throughout the

City was necessary "to ensure street safety and lack of congestion" on all the City's many sidewalks. *Id.*

By sharp contrast, Honolulu's peddling ordinance (Section 29-6.2(b)(7), Revised Ordinances of Honolulu, reprinted at Pet. 2-3) carefully identifies only nine limited areas where peddling is prohibited. These nine areas were selected because they have special scenic beauty or historical importance, or because they present special problems of pedestrian movement and safety. The Ninth Circuit found that the compact Waikiki Special District met all three criteria: it is an area of great natural beauty and historical importance and its sidewalks are unusually congested. Pet. App. 6-11.

(2) The New York City ordinance contained an exception for veterans, who were allowed to obtain permits without regard to the overall number of permits issued. This exemption had the effect of casting doubt on the City's asserted interest in reducing the number of vendors, because the number of vending permits was randomly linked to the number of veterans who requested them rather than to any rational planning interests related to congestion or any other governmental goal.

Again by contrast, the Honolulu peddling ordinance has no such exception and is written and enforced in an even-handed fashion to promote the government's valid municipal interests.

(3) The New York City ordinance has another broad exception for vendors of newspapers, books, and all other written materials. The *Bery* court viewed the City's distinction between written and visual creative materials as

unjustified, and again saw the lack of regulation of vendors of written materials as casting doubt on the City's commitment to its asserted goals of safety and pedestrian movement.

Honolulu's peddling ordinance, by contrast, contains only three carefully limited exemptions: "newspapers of general circulation," "duly authorized concessions," and souvenir items sold in conjunction with parades. Honolulu Rev. Ordinances, sec. 29-6.2(b) and (c). The Ninth Circuit recognized that "[b]ecause these exemptions don't enable the city to discriminate against ideas it disfavors, they don't render the ordinance content-based. *See Leathers v. Medlock*, 499 U.S. 439, 450 (1991)." Pet. App. 8 n.5. Nor did Petitioners challenge these exemptions in their Petition.

(4) Because the New York City ordinance was city-wide, the *Bery* court ruled that its effect was to deny artists any appropriate alternative channel of communication to reach their intended audience.

The Honolulu peddling ordinance, because it is limited to nine carefully delineated areas, allows an enormous number of alternative locations throughout the City of Honolulu where sidewalk peddling is permitted.

CONCLUSION

Because of the significant factual differences between the ordinance under review in *Bery* and Honolulu's peddling ordinance, the Second Circuit's holding in *Bery* is not inconsistent with the Ninth Circuit's holding in the

present case. Because no conflict among the circuits exists and for all the other reasons set forth in the Brief in Opposition, Petitioners' request for a writ of certiorari should be denied.

Respectfully submitted,

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